LICENSE HAND BOOK

BRIEFS, DECISIONS AND OPINIONS

Pertaining to the Collection of License Taxes by States and Municipalities from Salesmen and Deliverymen engaged in soliciting orders for future delivery

CHAPTER I.

Salesmen in the employ of The Aluminum Cooking Utensil Company selling "WEAR-EVER" aluminum utensils in strict accordance with the plan outlined in the Company's BOOK OF INSTRUCTIONS TO SALESMEN are not required to pay any tax or license for the privilege of soliciting orders or of making deliveries to customers. This protection is afforded under

TWO LINES OF DEFENSE.

First and most important is that the Constitution of the United States, Article 1, Paragraph 8, provides: "That Congress shall have power *** to regulate commerce with foreign nations and among the several States and of the Indian tribes." And by a long line of decisions of the United States Supreme Court as briefed in the following pages, the imposition of a license or tax within one state upon the selling of the products of another state is contrary to both the letter and spirit of the Constitution, provided the goods are outside of the state at the time the contract of sale is made. There are also numerous decisions to the effect that the right to sell takes with it the right to deliver the goods and collect therefor.

The only exceptions are in the cases of salesmen working in the states of Pennsylvania, Illinois and Oregon, where the Company maintains warehouses from which shipments within the respective states are made. In these states, however, decisions of the State Courts as briefed in the following pages relieve The Aluminum Cooking Utensil Company's salesmen in most cases. While there is a slight possibility in these three states that a man might be held for the payment of a license, yet up to the time this book is published no case has been lost in trial by any of the Company's salesmen.

The second line of defense is that nearly all municipal ordinances under which payment of licenses is demanded make some discrimination in favor of local residents or merchants and against residents, merchants or manufacturers of other localities. The Courts universally hold that this basis of classification protecting merchants from competition within a limited area and preventing those outside of such area from the solicitation of sales within the area without the taking out of a license, is unreasonable; and such acts are held to be invalid.

METHOD OF OPERATION PURSUED BY "WEAR=EVER" SALESMEN.

Orders are solicited by salesman from individuals, the salesman displaying samples and catalogs describing the goods. At intervals the salesman places a requisition with the Company for such goods as he requires to fill the orders he has secured. Subsequent to the taking of the orders the Company ships the goods to the salesman, who then delivers the material to the customers and collects the price thereof. The salesman is paid a commission for his services, and at the time the goods are shipped the Company mails to the salesman a statement showing the material shipped, the amount to be collected for all the goods thereon, and the amount due the Company after the salesman's commission has been deducted. The salesman furnishes the Company with security for the goods requisitioned by him to fill orders. The security is in the form of a personal bond furnished by a third party, or by a cash deposit made at the time the requisition is placed to cover in full or in part the Company's share of the collections. In event part only of the Company's share of the collections is deposited as security, the Company ships the goods C. O. D. for the remainder, which amount the salesman deposits before securing the goods by paying the amount of the C. O. D. The text of the contract existing between the salesman and the Company is fully given on page 5. The goods are shipped to the salesman in bulk for the sake of economy and convenience in accounting and general handling of the transaction. Each requisition from the salesman is accompanied by the individual orders from his customers.

The object of marketing "WEAR-EVER" goods in this manner is to encourage and stimulate the sale of aluminum wares by reason of the personal demonstration of the advantages of such goods that is made by the salesman when interviewing his customers. The policy is more fully discussed in Chapter XLII, entitled "Why We Employ Advertising Salesmen."

WHY LICENSES ARE DEMANDED.

Many cities and towns have passed ordinances which prohibit the solicitation of sales by salesmen calling personally upon the residents of the town (ordinarily called canvassing) or of the delivery of goods sold by such canvassing salesmen, unless a license has been paid. The fact that such ordinances are invalid and unconstitutional is becoming so well understood that municipal authorities seldom attempt to

enforce them, but occasionally municipal officials will attempt to collect the license, even going so far as to arrest the salesman in event payment is refused. The "WEAR-EVER" salesman is instructed that in event the officials of any town in which he is working require the payment of a license he is to respectfully explain the manner in which he is operating and his general line of defense as described above. He makes it clear that he is not a peddler, that he does not carry a stock of goods within the state, that he delivers no goods except such as are outside of the state at the time the orders are taken, that he is merely an agent in the employ of The Aluminum Cooking Utensil Company, which does not have a stock of goods in the state where the sales are made, and that his work falls within Interstate Commerce as it has been defined by the Courts.

IN EVENT OF ARREST.

Should a "WEAR-EVER" salesman be arrested for conducting his work without taking out a license, he must, of course, employ legal counsel to assist him. This book is intended as a hand-book or guide for the attorney in handling his case. Release from arrest must be immediately sought under habeas corpus proceedings as that is the quickest way of settling the question. When a Federal District Judge is within reach the habeas corpus petition should be presented to him rather than to a State Judge. *Ex parte Green 114 Federal 959, in re Tinsman 95 Federal 648,** and a number of other cases cited in the latter decision furnish ample authority for taking a matter of this kind before a Federal Judge on habeas corpus proceedings.

BROKEN PACKAGES.

In some cases municipal authorities practically admitting that the transaction is Interstate Commerce will base their contentions entirely upon the fact that the goods are shipped in bulk, contending that the individual order for each customer must be separately packed and tagged with his or her name to make the transaction Interstate Commerce. The point is covered in a number of cases cited in the brief of our general counsel, Messrs. Gordon & Smith of Pittsburgh (page 9), but particularly in Rearick vs. Pennsylvania and Caldwell vs. North Carolina.

* See page 33 for decision in this case.

ATTORNEYS GENERAL.

Recognizing the fact that occasionally municipal officials will unadvisedly attempt to enforce against "WEAR-EVER" salesmen, ordinances which do not fit the case, the Attorneys General of several states in their effort to prevent the clogging of the Courts of their states with avoidable and unnecessary litigation have expressed opinions on the subject that are quoted herein under the chapters dealing with their respective states. These officials have felt justified in expressing such opinions because the principle has been so often passed upon by the Courts of the state that in giving an opinion they are really only calling attention to court decisions that are matters of public record.

INTRA-STATE SHIPMENTS.

In the states of Pennsylvania, Illinois and Oregon the defense of interstate commerce cannot be maintained, as The Aluminum Cooking Utensil Company maintains warehouses and shipping depots in each of these states, from which sources shipments to points within the respective states are made. However, there are other lines of defense in each of these states, which will in nearly every case clear the "WEAR-EVER" salesman from the necessity of paying a license. The line of defense for each of these states is separately covered in the proper respective chapters following.

BRIEFS, DECISIONS AND OPINIONS.

In preparing his defense any attorney retained by a "WEAR-EVER" salesman, if in any other state than Pennsylvania, Illinois or Oregon, should first carefully read the brief of Messrs. Gordon & Smith immediately following, and also the decisions and authorities listed in the separate chapters under the various states.

SALESMEN'S CONTRACT.

THE ALUMINUM COOKING UTENSIL COMPANY, a Corporation of the State of Pennsylvania, having an office and place of business in the Borough of New Kensington, hereinafter called the Company, and.....
Name
of.....
Town
hereinafter called the Salesman, in consideration of the mutual agreements herein contained, have made and entered into the following Contract this.....day of.....
.....A. D. 191.....

FIRST: The Company hereby agrees to appoint and does appoint the Salesman as its agent for the canvass and sale of its goods in the following territory, to-wit:.....
.....
(Territory not to be filled in by Salesman)

The Company further agrees not to appoint another agent to canvass in the described territory while all the conditions of this contract are fulfilled by the Salesman.

SECOND: The Salesman accepts said appointment and agrees to deposit $5.00 with the Company when this contract is signed. The said sum of $5.00 is to be placed to his credit and to be applied on the purchase price of his sample outfit. In case the Salesman fails to order his sample outfit, or begin work on the date specified, said $5.00 will be forfeited and will remain the property of the Company as liquidated damages for the breach of this contract.

The Salesman further agrees to order his sample outfit not later than.....191....., and to send cash with the order for the full net amount thereof, less the $5.00 already deposited, referred to above, or to insure payment of the balance by furnishing the Company the security described in the Eighth Article below, it being understood that in this latter case payment of this balance is to be made from the proceeds of the first delivery.

THIRD: The Salesman agrees to begin his canvass on or before.....191..... and agrees that his failure to do so shall forfeit his right to the territory; but the Company may for cause grant the Salesman an extension of time, which extension shall not be effective unless given in writing.

FOURTH: The Company agrees to send with the sample outfit a book entitled "Instructions to **'Wear-Ever'** Salesmen," which is to remain the property of the Company and which the Salesman agrees to return without demand to the Company on or before the termination of this contract.

FIFTH: The Company agrees to furnish the Salesman with a catalogue and price list of its goods, and in so far as practicable to ship with reasonable promptness all goods included in requisitions sent by him, unless the Salesman is authorized to take orders for salesman's specialties only, in which event no other article will be shipped on requisitions sent in by him.

SIXTH: The Salesman agrees diligently and with his utmost ability to solicit orders for **"Wear-Ever"** Aluminum Cooking Utensils in the specified territory, and to keep faithfully and accurately a complete record of all receipts and expenditures in a book to be supplied by the Company and known as "Salesman's Account and Expense Book."

SEVENTH: The Salesman agrees to send in two reports each week, one to the Division Supervisor of the Company, and the other to the Company, upon forms furnished by the Company, giving the number of hours worked each day, the amount of each day's orders, and the sum total of all orders at list prices taken during the week; it being understood that failure to report each week gives the Company the right to cancel this Contract.

EIGHTH: The Salesman agrees to be personally responsible for the payment for all goods included in requisitions sent to the Company for goods required to fill orders solicited for the Company by him, and to insure payment for such goods by giving a security satisfactory and acceptable to the Company either in accordance with a form furnished by the Company, known as a Letter of Credit, or by means of a bond issued by a Surety Company; or in case such security is not given, the Salesman agrees to deposit cash with each requisition to the amount of the Company's share of the proceeds from the delivery of the goods included in the requisition.

The Salesman further agrees, when goods are shipped under security as above provided, to remit promptly to the Company its share of the proceeds from the first collections on account of each delivery, and agrees that no delivery will be delayed longer than thirty days from the date of shipment of the goods by the Company, unless an extension of time has been asked for by the Salesman and granted by the Company.

NINTH: The Company agrees to allow the Salesman, upon all sales made by him, a commission of 40% on its published price list and the Salesman agrees to remit to the Company the net

amount after deducting said commission. The Salesman also agrees not to use the Company's money for personal use of any kind, but his commission only for such purpose. The commission herein stated is allowable only upon requistions for goods submitted during the life of the contract, and only upon such goods as the Salesman has collected the selling price of.

TENTH: The Salesman agrees to pay all transportation charges on goods included in requisitions sent in by him and not to requisition any goods except those for which actual orders have been received.

ELEVENTH: The Company agrees, in case the Salesman at the end of his canvass has goods of the Company which have been ordered by purchasers, but which the purchasers have failed or refused to accept, amounting in the aggregate to not more than $20.00, that the same may be returned by him to the Company and that the Company thereupon will relieve the Salesman from responsibility for the payment for same by the purchasers, privided (a) that the goods are in good condition, (b) that the Company is notified of the amount thereof before shipment is made, and (c) that the return transportation charges are paid by the Salesman; it being understood that the sample outfit is not included in this provision.

TWELFTH: The Salesman has no power or authority to incur or contract any liability of any kind for or in the name of the Company or for which the Company could or might be liable to others.

THIRTEENTH: This Contract shall terminate.....191..... Extension of time, however, may be obtained by special arrangement with the Company, within, but not before, the ten days preceding said date of termination.

FOURTEENTH: The Company reserves the right at any time to require the Salesman to confine all of his sales to the salesman's specialties only.

FIFTEENTH: The salesman understands that if he fails to make sales averaging $..... .....a week at list prices, the Company will consider such failure a sufficient ground for terminating this Contract.

IN WITNESS WHEREOF: The Company has caused this contract to be signed by an authorized representative and the Salesman has affixed his signature the day and year first above written.

(Salesman Sign Here)

THE ALUMINUM COOKING UTENSIL CO.,

.....

By.....

Present Address { Town..... St. & No..... College.....

Home Address { Town..... St. & No.....

No.....

Accepted

.....

LETTER OF CREDIT.

To THE ALUMINUM COOKING UTENSIL CO.,
New Kensington, Pa.

.....191.....

GENTLEMEN:

In consideration of your taking into, or continuing in, your employ.....
(Salesman's Name here)

.....
(Salesman's Address here)

to be employed from time to time in such portions of the United States as you shall deem proper, I hereby agree to pay you forthwith for all goods ordered of you from time to time and not paid for by him when due. My liability not to exceed

.....Dollars

$..... Yours truly,

....(Seal)
(Name of WITNESS here) (Name of SURETY here)

....
(Address of WITNESS here) (Address of SURETY here)

REFERENCES:

Name and address of Bank where Surety deals

....
(Name) (Address)

Name and address of two business or professional men who are acquainted with Surety

....
(Name) (Address)

....
(Name) (Address)

Write Names and Addresses Plainly.

CHAPTER II.

Brief of Authorities Exempting Salesmen and Delivery Men Engaged in Interstate Commerce from License Taxes Imposed by States and Municipalities.

Submitted April 28, 1913
By
GORDON & SMITH
Frick Building Annex, Pittsburgh, Pa.
General Counsel for
THE ALUMINUM COOKING UTENSIL CO.

BRIEF OF AUTHORITIES EXEMPTING SALESMEN AND DELIVERY MEN ENGAGED IN INTERSTATE COMMERCE FROM LICENSE TAXES IMPOSED BY STATES AND MUNICIPALITIES.

Brown vs. State of Maryland, 12 Wheat. 419 (1827).—An act of the legislature of Maryland provided "that all importers of foreign articles ******* or of *******distilled, spirituous liquors, &c., and other persons selling the same by wholesale, ********* shall, before they are authorized to sell, take out a license, ********* for which they shall pay fifty dollars."

Brown and others were indicted for having imported and sold foreign dry goods without having a license to do so. They demurred to the indictment and a judgment was rendered against them which was affirmed in the state Court of Appeals but reversed by the United States Supreme Court. The latter court held the act of the Maryland legislature void as repugnant to the provision of the Constitution of the United States, which declares that Congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Chief Justice Marshall in delivering the opinion of the court gave an admirable exposition of the purpose and meaning of this provision of the Federal Constitution (pp. 446-449):

> "What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several states? This question was considered in the case of *Gibbins v. Ogden*, 9 Wheat. 1, in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the constitution. The power is co-extensive with the subject on which it acts, and cannot be stopped at the external boundry of a state, but must enter its interior. We deem it unnecessary now to reason in support of these propositions. Their truth is proved by facts continually before our eyes, and was, we think, demonstrated, if they could require demonstration, in the case already mentioned.
>
> If this power reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse—one of its most ordinary ingredients is traffic. It is inconceivable, that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow

importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. *Congress has a right, not only to authorize importation, but to authorize the importer to sell.* If this be admitted, and we think it cannot be denied, what can be the meaning of an act of congress, which authorizes importation, and offers the privilege for sale, at a fixed price, to every person who chooses to become a purchaser? How is it to be construed, if an intent to deal honestly and fairly—an intent as wise as it is moral—is to enter into the construction? What can be the use of the contract, what does the importer purchase, if he does not purchase the privilege to sell? What would be the language of a foreign government, which should be informed, that its merchants, after importing according to law, were forbidden to sell the merchandise imported? What answer would the United States give to the complaints and just reproaches to which such an extraordinary circumstance would expose them? No apology could be received, or even offered. Such a state of things would break up commerce. It will not meet this argument, to say, that this state of things will never be produced; that the good sense of the states is a sufficient security against it. The constitution has not confided this subject to that good sense. It is placed elsewhere. The question is, where does the power reside? not, how far will it be probably abused? The power claimed by the state is, in its nature, in conflict with that given to congress; and the greater or less extent in which it may be exercised, does not enter into the inquiry concerning its existence. We think, then, that if the power to authorize a sale, exists in congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable.

If the principles we have started be correct, the result to which they conduct us cannot be mistaken. *Any penalty inflicted on the importer, for selling the article, in his character of importer, must be in opposition to the act of congress which authorizes importation.* Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to congress to regulate commerce, since an essential part of the regulation, and principal object of it, is, to prescribe the regular means for accomplishing that introduction and incorporation. The distinction between a tax on the thing imported and on the person of the importer, can have no influence on this

part of the subject. It is too obvious for controversy, that they interfere equally with the power to regulate commerce.

It has been contended, that this construction of the power to regulate commerce, as was contended in construing the prohibition to lay duties on imports, would abridge the acknowledged power of a state to tax its own citizens, or their property within its territory. *We admit this power to be sacred; but cannot admit, that it may be used so as to obstruct the free course of a power given to congress. We cannot admit, that it may be so used as to obstruct or defeat the power to regulate commerce.* It has been observed, that the powers remaining with the states may be so exercised as to come in conflict with those vested in congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the constitution has applied it to the often interfering powers of the general and state governments, as a vital principle of perpetual operation. It results, necessarily, from this principle, that the taxing power of the states must have some limits. It cannot reach and restrain the action of the national government, within its proper sphere. It cannot reach the administration of justice in the courts of the Union, or the collection of the taxes of the United States, or restrain the operation of any law which congress may constitutionally pass. It cannot interfere with any regulation of commerce. If the states may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the states from one port to another, for the purpose of re-exportation? The laws of trade authorize this operation, and general convenience requires it. Or what should restrain a state from taxing any article passing through it, from one state to another, for the purpose of traffic? or from taxing the transportation of articles passing from the state itself to another, for commercial purposes? These cases are all within the sovereign power of taxation, but would obviously derange the measures of congress to regulate commerce, and affect materially the purpose for which that power was given. We deem it unnecessary to press this argument further, or to give additional illustration of it, because the subject was taken up, and considered with great attention in *McCulloch v. State of Maryland*, 4 Wheat. 316, the decision in which case is, we think, entirely applicable to this.

It may be proper to add, that we suppose the principles laid down in this case, to apply equally to importations from a sister state. We do not mean to give any opinion on a tax discriminating between foreign and domestic articles.

Robbins vs. Shelby County Taxing District, 120 U. S. 489 (1887).—This is a leading case. Robbins solicited trade in Tennessee by the use of samples for a firm in Ohio selling writing materials. He was fined for "drumming" without a license under a statute of Tennessee providing that "All drummers, and all persons not having a regular licensed house of business in the Taxing District, offering for sale or selling goods, wares or merchandise therein, by sample, shall be required to pay to the county trustee the sum of $10 per week, or $25 per month, for such privilege, and no license shall be issued for a longer period than three months."

The Supreme Court of Tennessee affirmed the judgment against Robbins, but on writ of error the United States Supreme Court reversed the judgment and discharged Robbins. The opinion of the court, which is a masterly treatment of this entire subject, was delivered by Mr. Justice Bradley. The gist of it is embodied in the following sentences (p. 497):

> "When goods are sent from one state to another for sale, or, in consequence of a sale, they become part of its general property, and amendable to its laws; provided that no discrimination be made against them as goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way as other goods are. **********
>
> '*But to tax the sale of such goods, or the offer to sell them, before they are brought into the state, is a very different thing, and seems to us clearly a tax on interstate commerce itself.* **********
>
> '*Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state.*********
>
> '*The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce.*'"

Corson vs. Maryland, 120 U. S. 502 (1887).—Corson was indicted for selling by sample in Baltimore, without a license, goods for a New York firm to be shipped from New York directly to the purchaser, in violation of a Maryland Statute providing that "No person or corporation other than the grower, maker or manufacturer shall barter or sell, or otherwise dispose of, ********** any goods, chattels, wares or merchandise within this state without first obtaining a license."

Corson demurred to the indictment, but it was sustained by the court of original jurisdiction and the Court of Appeals of Maryland on writ of error. The judgment was reversed and Corson discharged by the United States Supreme Court, which held that the statute, like that in the last case, was unconstitutional as applied to Corson since he was engaged in interstate commerce.

Asher vs. Texas, 128 U. S. 129 (1888).—An act of the legislature of Texas provided that there should be collected "from every commercial traveller, drummer, salesman, or solicitor of trade, by sample or otherwise, an annual occupation tax of thirty-five dollars." Asher was a drummer engaged in Houston in soliciting trade by the use of samples for a Louisiana house, which manufactured rubber stamps. He was arrested and fined for pursuing the occupation of drummer without a license. He applied to a state court for a writ of *Habeas corpus*. Judgment was given against him by that court but on writ of error the United States Supreme Court reversed the judgment and remanded the cause with instructions to discharge the prisoner.

Stoutenburgh vs. Hennick, 129 U. S. 141 (1889).—Hennick was convicted in the Police Court of the District of Columbia of engaging within the District in the business of offering for sale, as agent of a Baltimore firm, certain goods without having obtained a license to do so, contrary to an act of the Legislative Assembly of the District, and on defaulting in payment of a fine and the license was committed to the workhouse. The act in question was a license act and provided that "Commercial agents shall pay two hundred dollars annually. Every person whose business it is, as agent, to offer for sale goods, wares or merchandise by sample, catalogue or otherwise, shall be regarded as a commercial agent." On writ of error the United States Supreme Court affirmed the judgment saying by Mr. Chief Justice Fuller (pp. 148-149):

> "The conclusions announced in the case of Robbins were that the power granted to Congress to regulate commerce is necessarily exclusive whenever the subjects of it are national or admit only of one uniform system or plan of regulation throughout the country, and in such case the failure of Congress to make express regulations is equivalent to indicting its will that the subject shall be left free; that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems; and that *a State statute requiring persons soliciting the sale of goods on behalf of individuals*

or firms doing business in another State to pay license fees for permission to do so, is, in the absence of congressional action, a regulation of commerce in violation of the Constitution. **********

In our judgment Congress, for the reasons given could not have delegated the power to enact the 3d clause of the 21st section of the act of assembly, construed to include business agents such as Hennick."

In re *Spain*, 47 Fed. 208 (C. C., E. D. N. C.—1891). Spain was employed by citizens of West Virginia, manufacturers of household goods, to sell their goods on the installment plan. The method was to carry samples from door to door and induce the purchaser to order direct from the manufacturers in West Virginia. The articles so ordered were consigned in bulk to Spain to be delivered by him. He opened the boxes and delivered the articles and on delivery the purchaser signed another contract with the manufacturers for future payments. Spain was arrested in North Carolina for peddling without a license in violation of a statute of that state providing that "Every person, a citizen of the United States, authorized to do business in this state, who, as principal or agent, peddles ****** goods, wares or merchandise, shall pay a license tax." He applied for a writ of *habeas corpus* to the Federal Court which directed that he be discharged from custody. In making the order Judge Bond said (pp. 210, 210-211):

"We may conclude then, safely, that these petitioners, when engaged in showing the samples of goods manufactured by their principals in West Virginia, were engaged in interstate commerce, and that, whether or not they came within North Carolina's statutory definition of peddlers, they could not be taxed by that state. So far the facts in this case coincide with those in Robbins v. Shelby County Taxing Dist. There is a fact, however, here which it is argued distinguishes it from that case. It is admitted that, while these petitioners—"drummers," as they are styled in Shelby County Taxing District Case—were engaged in the sale of goods from the West Virginia factory, which were ordered by the purchaser directly from that state, the whole of the articles sold, comprising every variety of small household stuff, was placed in a box or boxes, consigned in bulk to petitioners for distribution, and that, when the box containing them was opened, the property became intermingled with the property of the state, and was taxable, and the peddling of it liable to the tax prescribed. We are of opinion that under the decisions of the supreme court this property did not become taxable in North Carolina *until it reached*

> *the purchaser.* It is idle to say, as the supreme court does in the case quoted, that a non-resident may send drummers or persons to solicit sales in a sister state, but that the state may tax him for making delivery of the goods sold.**********
>
> *The right to sell implies the obligation and right to deliver. It is as much interstate commerce* to do the one as the other."

In re *Houston*, 47 Fed. 539 (C. C., W. D. Mo.—1891). Houston and Gerye were imprisoned under proceedings instituted in a justice's court in Missouri for peddling wares and merchandise without having taken out a peddler's license, and petitioned the Federal Court for a writ of *habeas corpus.* At the time of their arrest they were acting as agents for Kansas merchants carrying samples of goods from house to house soliciting custom on the installment plan. The first payment was made to the solicitor and represented his commission. He then sent in an order to the house in Kansas, the firm shipped to him the article contracted for, he delivered it to the purchaser, and the remaining payments were collected by a collecting agent of the firm. Gerye in one instance offered to sell a sample clock to a lady who declined to take it and he then sold it to another lady and delivered it immediately on receiving the first payment. The state statute provided: "Whoever shall deal in the selling of" certain goods (including clocks) "by going from place to place to sell the same, is declared to be a peddler." Judge Philips held that a sporadic, casual sale not in interstate commerce did not fix on Gerye the office of a dealer and ordered that the petitioners be discharged from custody, saying (p. 540):

> "The right of a non-resident merchant to thus employ agents to go beyond the limits of the state in which the merchant resides to solicit purchases, by taking orders on the house, to be filled, and the goods shipped into another state for delivery, without the goods being subject to a license tax of the state, or to an occupation tax on the solicitor, *has been established, beyond further controversy, by decisions of the Supreme Court of the United States.*"

In re *Nichols*, 48 Fed. 164 (C. C., W. D. Pa.—1891). Nichols was engaged in the business of soliciting orders for the sale of books published by a New York publisher, to whom the orders were sent to be filled, the books being delivered on terms meeting the publisher's approval. The publisher had a branch office or storeroom in Pittsburgh to which he shipped books from time to time from New York, and from which

he sent out the books needed to fill orders. Nichols was arrested in Titusville, Pa., and sentenced to pay a fine for violating an ordinance of that city providing "That all persons canvassing or soliciting within said city orders for goods, books ********* or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the mayor a license to transact said business, and shall pay to the said treasurer therefor the following," etc. Nichols applied to the federal court for a writ of *habeas corpus* and was discharged from imprisonment, the city being ordered to pay the costs. Judge Reed in making the order said (p. 166):

> "It was argued by the counsel for the city that the ordinance in question in this case was a proper police regulation for the protection of its citizens, and to add to their comfort, 'by preventing the intrusive domiciliary visitations of canvassers and peddlers, who go from house to house in relentless personal pursuit of purchasers.' But, conceding (what is extremely doubtful, if, indeed not denied by the case of Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. Rep. 681) that a state or municipality may regulate the manner in which citizens of other states may prosecute their business by selling goods and merchandise not hurtful in themselves, still the ordinance does not purport to be such a regulation. It is solely for the purpose of raising revenue. Any person paying the prescribed license fee may, during the period covered by his license, freely transact business in the city, even to the extent of 'intrusive domiciliary visits' to the unfortunate inhabitants."

In re *Tyerman*, 48 Fed. 167 (C. C., W. D. Pa.—1891). The facts in this case were similar to those in the case last cited save that Tyerman was employed to deliver the books which had been sold by Nichols and to collect the price therefor. The books were sent to him from the branch office in Pittsburgh. Arrested for violating the Titusville ordinance, he also petitioned for a writ of *habeas corpus* and was discharged. Judge Reed said (p. 167):

> "*There is no difference in principles between the two cases*, this petitioner being engaged in completing the sales made by Mr. Nichols, and therefore engaged in interstate commerce."

Brennan vs. Titusville, 153 U. S. 289 (1894).—Shephard, a manufacturer of pictures and picture frames in Illinois, employed agents on salary and commission to solicit orders therefor in other states by exhibiting samples from house to house. Brennan solicited orders in this way in Titusville, Pa., and forwarded them to Shephard at Chicago

and the goods were shipped by him to the purchasers. Brennan was arrested and fined for violating the city ordinance quoted above (see In re Nichols, supra), the city sued to recover the fine and recovered a judgment which was affirmed by the Supreme Court of Pennsylvania, but reversed on writ of error by the United States Supreme Court. That court said in a unanimous opinion speaking by Mr. Justice Brewer (pp. 297-298, 298-299, 302):

"The question in this case is whether a manufacturer of goods, which are unquestionably legitimate subjects of commerce, who carries on his business of manufacturing in one State can send an agent into another State to solicit orders for the products of his manufactory without paying to the latter State a tax for the privilege of thus trying to sell his goods.

'It is true, in the present case, the tax is imposed only for selling to persons other than manufacturers and licensed merchants; but if the State can tax for the privilege of selling to one class, it can for selling to another, or to all. In either case it is a restriction on the right to sell, and a burden on lawful commerce between the citizens of two States. **********

'It is true, also, that the tax imposed is for selling in a particular manner, but a *regulation as to the manner of sale, whether by sample or not, whether by exhibiting samples at a store or at a dwelling house is surely a regulation of commerce.* **********

'This license, therefore, the failure to take out which is the offence complained of, and for which defendant was sentenced, is a license for 'general revenue purposes' within the very declarations of the ordinance. Even if those declarations had been the reverse, and the license in terms been declared to be exacted as a police regulation, that would not conclude this question, for *whatever may be the reason given to justify, or the power invoked to sustain the act of the State, if that act is one which trenches directly upon that which is within the exclusive jurisdiction of the national government, it cannot be sustained.* **********

'It is undoubtedly true that there are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the State; *but we think it must be considered, in view of a long line of decisions, that it is settled that nothing which is a direct burden upon interstate commerce can be imposed by the State without the assent of Congress, and that the silence of Congress in respect to any matter of*

> *interstate commerce is equivalent to a declaration on its part that it should be absolutely free.*
>
> 'That this license tax is a direct burden on interstate commerce is not open to question.' "

Pabst Brewing Co. v. City of Terre Haute, 98 Fed. 330 (C. C., D. Indiana—1899):—Pabst Brewing Company sued in a federal court in Indiana for an injunction to restrain the enforcement of an ordinance of the City of Terre Haute providing that "Every person ****** or corporation ****** maintaining in said city ********** a brewery or breweries, depot or depots, or agency or agencies of breweries, shall pay to said city the sum of one thousand dollars for each such brewery, depot or agency so ********** maintained, which sum of one thousand dollars shall be the annual city license fee to be charged to such breweries, depots or agencies." Pabst Brewing Company alleged that it was a Wisconsin corporation and shipped from its manufactory in that state to a depot in Terre Haute malt liquors which were kept in the depot until removed to be delivered to Indiana customers. The injunction was asked for on the ground that the ordinance was in conflict with the commerce clause of the Federal Constitution. Judge Baker granted the injunction saying (pp. 332-333):

> "The right to transport beer from one state and introduce it into another is interstate commerce, the regulation of which has been committed by the national constitution to the congress, and hence a state law denying such right, or substantially interfering with, or hampering the same, is in conflict with the constitution of the United States. The right to ship beer or other intoxicating liquors from one state into another *carries with it the incidental right in the consignee or receiver of such goods to sell the same in the original packages, without regard to state legislation.*"

Stockard vs. Morgan, 185 U. S. 27 (1902).—Stockard sought to enjoin the collection of a privilege tax upon him as a "merchandise broker" under the laws of Tennessee on the theory that these laws were void as against him since he was engaged solely in interstate commerce. Stockard was a resident of Tennessee, but the represenative of parties non-resident in Tennessee, for whom he solicited orders from jobbers in Chattanooga, which he sent to his non-resident principals. If the order was accepted the goods were shipped by the non-resident principal from another state to the local jobber. Stockard had an office in Chattanooga where he kept samples, but he traveled around on foot drumming. The chancellor in the court of first instance enjoined the collection of the tax, but his judgment was reversed by

the State Supreme Court which dismissed the bill. On writ of error the United States Supreme Court reversed the latter judgment saying by Mr. Justice Peckham (p. 37):

> "Although it is said in the opinion of the state court herein that the thing taxed is the occupation of merchandise brokerage, and not the business of those employing the brokers, yet we have seen from the cases already cited that when the tax is applied to an individual within the State selling the goods of his principal who is a non-resident of the State, it is in effect a tax upon interstate commerce, and that fact is not in anywise altered by calling the tax one upon the occupation of the individual residing within the State, while acting as the agent of a non-resident principal. *The tax remains one upon interstate commerce, under whatever name it may be designated.*
>
> Although the State has general power to tax individuals and property within its jurisdiction, yet *it has no power to tax interstate commerce, even in the person of a resident of the State.*"

Caldwell vs. North Carolina, 187 U. S. 622 (1903).—An ordinance of Greenboro, N. C., provided "That every person engaged in the business of selling *or delivering* picture frames, pictures, photographs or likenesses of the human face, in the City of Greensboro, whether an order for the same shall have been previously taken or not, unless the said business is carried on by the same person in connection with some other business for which a license has already been paid to the city, shall pay a license tax of ten dollars for each year." Caldwell, employed by the Chicago Portrait Company, an Illinois corporation, came to Greensboro to deliver certain pictures and frames sold by other employees of the Chicago Portrait Company who had preceded him. The pictures and frames were shipped to Greensboro addressed to the Chicago Portrait Company, Caldwell took them from the railway, *broke the bulk, placed the pictures in proper frames and delivered them to the purchasers.* Neither the Chicago Portrait Company nor any of its employees paid the city any license tax. Caldwell was sentenced to pay a fine for violating the ordinance above quoted and this judgment was affirmed by the Supreme Court of North Carolina. On writ of error the judgment of that court was reversed by the United States Supreme Court, which said in a unanimous opinion by Mr. Justice Shiras (pp. 632-633):

> "Transactions between manufacturing companies in one State, through agents, with citizens of another con-

> stitute a large part of interstate commerce; and for us to hold, with the court below, that the same articles, if sent by rail directly to the purchaser, are free from state taxation, but if sent to an agent to deliver, are taxable through a license tax upon the agent, would evidently take a considerable portion of such traffic out of the salutary protection of the interstate commerce clause of the Constitution.
>
> It cannot escape observation that efforts to control commerce of this kind, in the interest of the States where the purchasers reside, have been frequently made in the form of statutes and municipal ordinances, but that such efforts have been heretofore rendered fruitless by the supervising action of this court."

Norfolk & Western Ry. Co. vs. Sims, 191 U. S. 441 (1903).—A statute of North Carolina provided that "Every manufacturer of sewing machines, and every person or persons or corporation, engaged in the business of selling the same in this State, shall, before selling or offering for sale any such machine, pay to the state treasurer a tax of $350 and obtain a license." Mrs. Satterfield, a resident of North Carolina, sent an order by mail to Sears, Roebuck & Co. of Chicago, for a sewing machine, which was shipped by that company as railroad freight under a bill of lading. The bill of lading was sent C. O. D. to an express agent in North Carolina, who received the price of the machine from Mrs. Satterfield and delivered the bill of lading to her. Sims, a tax collector, forbade delivery by the railway company to Mrs. Satterfield until the tax of $350 was paid by Sears, Roebuck & Co. and levied on the machine for the tax. A state court ordered that the machine be sold to pay the tax. This judgment was affirmed by the Supreme Court of North Carolina, but reversed by the United States Supreme Court, which said by Mr. Justice Brown (pp. 447, 449, 451):

> "That possession shall be retained until payment of the price may or may not have been a part of the original bargain, but in substance it is a mere method of collection, and we have never understood that a license could be imposed upon this transaction, except in connection with the prior agreement to sell, although in certain cases arising under the police power it has been held that the sale is not complete until delivery, and sometimes not until payment. Were it not for the opinion of the Supreme Court of North Carolina, we should have said that the words 'engaged in the business of selling the same within the State' had reference to the word 'selling' in its popular and ordinary sense, of selling from a stock on hand or upon a special order to a manufacturer, and not to a mere method of collecting money; but, however, this may be,

*it is evident the state courts could not give it a construction which would operate as an interference with interstate commerce, and that upon this question the opinion of this court is controlling.**********************************

'For the past seventy-five years and ever since the original case of Brown vs. Maryland, 12 Wheat. 419, we have uniformly held that States have no power to tax directly or by license upon the importer, goods imported from foreign countries or other States, while in their original packages, or before they have become commingled with the general property of the State and lost their distinctive character as imports.************************

'The case is one of the most important ever decided by this court, and has been adhered to by a uniform series of decisions since that time.*******************

'While technically the title of the machine may not have passed until the price was paid, the sale was actually made in Chicago, and *the fact that the price was to be collected in North Carolina is too slender a thread upon which to hang an exception of the transaction from a rule which would otherwise declare the tax to be an interference with interstate commerce.*' ''

Rearick vs. Pennsylvania, 203 U. S. 507 (1906).—Rearick was convicted for violating an ordinance of the Borough of Sunbury, which made it unlawful to solicit orders for sale or delivery at retail, either on the streets or by traveling from house to house, of foreign or domestic goods, not of the parties' own manufacture or production, without a license, for which a large fee was required. Rearick was agent of an Ohio corporation which employed him to solicit in Sunbury retail orders to the company for groceries, which the company filled, when it had received a large number of them, at its place of business in Columbus, putting the objects of the orders in distinct packages identified by the customer's name, and forwarding them to Rearick by rail. The company kept no book accounts with the customers, looking only to Rearick, who delivered the goods to the customers, for cash paid to him, which he sent to the corporation. Brooms ordered were tagged like the other articles, but were then tied in bundles, wrapped conveniently for shipment. Rearick had no license, claiming the ordinance to be void as to him under the commerce clause of the Federal Constitution. Judgment against him in the Superior Court of Pennsylvania from which the Supreme Court of Pennsylvania had disallowed an appeal was reversed by the United States Supreme Court, which said by Mr. Justice Holmes (pp. 511, 511-512, 512):

"In other words, it was contended that the brooms before they were sold had become mingled with, or part of, the common mass of goods in the State, and so subject to the local law. But the doctrine as to original packages primarily concerns the right to sell within the prohibiting or taxing State goods coming into it from outside. When the goods have been sold before arrival, the limitations that still may be found to the power of the State will be due, generally, at least, to other reasons, and we shall consider whether the limitations may not exist, irrespective of that doctrine, in some cases where there is no executed sale. **********

'The fair meaning of the agreed fact that the orders were given to agents employed to solicit them, is that the company offered the goods and that the orders were acceptances of offers from the other side. If there were the slightest reason to doubt that the contracts were made with the company through its authorized agent at the moment when the orders were given, which we do not perceive that there is, certainly the contrary could not be assumed in order to sustain a conviction. It is for the prosecution to make out its case. We may mention here in parenthesis that of course it does not matter to the question before us that the *contract* was made *in* Pennsylvania. **********

'The brooms were specifically appropriated to specific contracts, in a practical, if not in a technical, sense. Under such circumstances it is plain that, *wherever might have been the title, the transport of the brooms for the purpose of fulfilling the contracts was protected commerce.*'"

Dozier vs. Alabama, 218 U. S. 124 (1910).—Dozier was sentenced to pay a fine for breach of an Alabama statute imposing a license tax on persons who did not have a permanent place of business in the state and also keep picture frames as a part of their stock in trade, if they solicited orders for the enlargement of pictures, or for picture frames, or if they sold or disposed of picture frames. A company engaged in this business in Illinois solicited orders in Alabama without paying a license tax. The enlarged pictures were delivered in frames which the purchaser might buy at factory prices if he chose to do so. Dozier, who also had no permanent place of business in Alabama and had paid no license tax was an agent of the company, who delivered pictures and frames and collected for them, the pictures and frames being sent to him and remaining the property of the company till paid for and delivered. The Supreme Court of Alabama, while admitting that the dealings concerning the pictures were interstate com-

merce, sustained the conviction on the ground that the sale of frames was a wholly local matter. This judgment was reversed by the United States Supreme Court, which said in a unanimous opinion by Mr. Justice Holmes (pp. 127-128, 128):

> "No doubt it is true that the customer was not bound to take the frame unless he saw fit, and that the sale of it took place wholly within the State of Alabama, if a sale was made. But as was hinted in *Rearick v. Pennsylvania*, 203 U. S. 507, 512, *what is commerce among the States is a question depending upon broader considerations than the existence of a technically binding contract, or the time and place where the title passed.* **********

> 'We are of opinion that the sale of the frames cannot be so separated from the rest of the dealing between the Chicago company and the Alabama purchaser as to sustain the license tax upon it. Under the decisions the statute as applied to this case is a regulation of commerce among the States, and void under the Constitution of the United States, Art. 1, Sec. 8.'"

Crenshaw vs. Arkansas, 227 U. S. 389 (1913).—Crenshaw and Gannaway were convicted under the law of the State of Arkansas providing "That hereafter before any person, either as owner, manufacturer or agent, shall travel over and through any County and peddle or sell any ******* steel stove range, ********** buggy ********** or other vehicle ********, he shall procure a license as hereinafter provided from the County Clerk of such County authorizing such person to conduct such business," and "he shall pay into the County Treasury of such County the sum of Two Hundred Dollars ($200)." The Range Company, a corporation with its principal office and factory in Missouri, manufactured ranges which were sold by traveling salesmen. In various counties of Arkansas a division superintendent had the supervision of its business with four other employees, two known as sample men or salesmen and two as delivery men, under his direction. When an order was taken by a salesman the purchaser signed a note for the purchase price to be void if the company failed to deliver the range within sixty days. The division superintendent then investigated the credit of the purchaser, and if it was satisfactory, had the order filled. Deliveries were made by the company's delivery men. Wagons and teams used by the agents were the company's property. The sample ranges were not sold by the salesmen. The salesmen did not deliver ranges nor did the delivery men take orders for them. The ranges were shipped in car load lots to the company in care of the division

superintendent, who sent to the company every month all notes and all cash in hand over $500, which was retained as expense money. Gannaway was a salesman of the company who had exhibited sample ranges in Arkansas and taken orders for ranges and Crenshaw was a delivery man who had delivered ranges to parties who had given orders to the salesmen. Their conviction was affirmed by the Arkansas Supreme Court. This judgment was reversed by the United States Supreme Court in a unanimous opinion by Mr. Justice Day, who said (pp. 399, 400-401):

> "Nor does the fact that the law now in question was alleged to have been passed in the exercise of the police power of the State make it lawful. In *Railroad Co. v. Husen*, 95 U. S. 465, 473, this court said that *the police power of a State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise;* and under color of it objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution." **********

> In the majority opinion of the Supreme Court of Arkansas the definition of hawkers and peddlers as understood at common law was recognized—as one who goes from house to house or place to place *carrying his merchandise with him which he concurrently sells and delivers*, 2 Bouvier, 642—but it was said that the legislature of Arkansas might define the word peddlers so as to include such as traveled from place to place and took orders for goods from other States and that such persons, because of the statute declaring them so, were peddlers and liable to be taxed under the lawful exercise of the police power of the State. *We must look, however, to the substance of things, not the names by which they are labelled, particularly in dealing with rights created and conserved by the Federal Constitution and finding their ultimate protection in the decisions of this court.* At common law and under the statutes which have been sustained concerning peddlers *they are such as travel from place to place selling the goods carried about with them, not such as take orders for the delivery of goods to be shipped in the course of commerce.* Here, as the facts show, the sample ranges carried about from place to place are not sold. Orders are taken and transmitted to the manufacturer in another State for ranges to be delivered in fulfillment of such orders, which are in fact shipped in interstate commerce and delivered to the persons who ordered them. Business of this character, as well settled by the decisions of this court, constitutes interstate commerce, and the privilege of doing it cannot be taxed by the State."

Rogers vs. Arkansas, 227 U. S. 401 (1913).—Rogers and others were convicted of peddling buggies without having paid the Arkansas license tax. They were salesmen of a partnership with its principal place of business and factory in Iowa, with manufactured buggies and automobiles, and had no permanent place of business in Arkansas, but sent a force of salesmen into that state, in charge of a superintendent, who travelled about exhibiting sample buggies and took orders for future delivery. Where orders were taken a note for the price was secured and the orders were turned over to a superintendent, who, if he found the financial responsibility of the customers satisfactory, transmitted the orders to an agent of the company at Memphis, Tennessee, where vehicles of the company were stored. The vehicles selected to fill the orders were tagged with the purchaser's name and shipped in car load lots to the company at a place near where they were to be delivered. An employee of the company, usually a different person from the salesman, received the vehicles and delivered them to the purchasers, no storage house being maintained at the point. No vehicles, save the samples, which were never sold, were brought into Arkansas except for the purpose of delivery on orders previously taken. The conviction of the canvassers was affirmed by the Arkansas Supreme Court, but reversed by the Supreme Court of the United States, which said by Mr. Justice Day (p. 409):

> "The manner in which the business of soliciting orders for and delivering vehicles was done by the Spaulding Manufacturing Company, differs in no practical or material particular from that employed by the Wrought Iron Range Company in the case just decided (*Crenshaw v. Arkansas*). In fact, the only difference is that the ranges were shipped to the company bearing no marks to identify the purchasers, and were delivered to the purchasers by the deliverymen without distinction, while the vehicles were tagged at Memphis and upon arrival in Arkansas were delivered by the deliverymen to the purchasers whose names appeared upon the tags attached to the vehicles. *This is merely a matter of detail in the manner in which the business is conducted and does not affect its character.* The decision in *Crenshaw v. Arkansas, ante*, p. 389, has dealt with precisely the same statute and substantially the same facts and controls the present cases."

This question being a federal one the decisions of the United States Courts are, of course, controlling thereon. We shall, therefore, merely refer, without comment, to cases in state courts which support the holdings of the federal cases we have cited:

Alabama—State v. Agee, 83 Ala. 110;
Ex parte Murray, 93, id. 78; Stratford v. Montgomery, 110 id. 619.

Colorado—Ames v. People, 25 Colo. 511.

District of Columbia—*In re* Hennick, 5 Mackey 489.

Florida—Cason v. Quinby, 53 So. 741.

Georgia—Wrought Iron Range Co. v. Johnson, 84 Ga. 754; McClelland v. Marietta, 96 id. 749; Stone v. State, 117 id. 292; Kehrer v. Stewart, 117 id. 969.

Idaho—*In re* Kinyon, 9 Idaho 642.

Illinois—Emmons v. Lewistown, 132 Ill. 382; Bloomington v. Bourland, 137 id. 536.

Indiana—Martin v. Rosedale, 130 Ind. 109; Huntington v. Mahan, 142 id. 695.

Kansas—Ft. Scott v. Pelton, 39 Kan. 766; State v. Hickox, 64 id. 654.

Kentucky—Commonwealth v. Pearl Laundry Co., 105 Ky. 259.

Louisiana—Simmons Hardware Co. v. McGuire, 39 La. Ann., 848; McClellan v. Pettigrew, 44 id. 356; Pegues v. Ray, 50 id. 574.

Michigan—Coit v. Sutton, 102 Mich. 324; Wilcox Cordage Co. v. Mosher, 114 id. 64; People v. Bunker, 128 id. 163.

Mississippi—Overton v. Vicksburg, 70 Miss. 558; Richardson v. State, 11 So. 934.

Nebraska—Menke v. State, 97 N. W. 1020.

Nevada—*Ex parte* Rosenblatt, 19 Nev. 439.

New Jersey—Kolb v. Boonton, 64 N. J. L. 163.

North Carolina—State v. Bracco, 103 N. C. 349; Wrought Iron Range Co. v. Campen, 135 N. C. 506.

North Dakota—State v. O'Connor, 5 N. D. 629.

Oklahoma—Baxter v. Thomas, 4 Okla. 605.

Pennsylvania—Mearshon v. Pottsville Lumber Co., 187 Pa. 16.

South Dakota—State v. Rankin, 11 S. D. 144.

Tennessee—Hurford v. State, 91 Tenn. 669; State v. Scott, 98 id. 254.

Texas—*Ex parte* Holman, 36 Tex. Crim. Rep. 255; Talbutt v. State, 39 id. 64; Turner v. State, 41 id. 545; Harkins v. State, 75 S. W. 26.

Virginia—Adkins v. Richmond, 98 Va. 91.

West Virginia—State v. Lichtenstein, 44 W. Va. 99.

Wyoming—Clements v. Town of Casper, 4 Wyo. 494; State v. Willingham, 9 id. 290.

In many cases it will be found that the statute or ordinance under which it is attempted to levy a tax on salesmen or delivery men engaged in interstate commerce does not by its very terms apply to them as, e. g., where it imposes a tax on "hawkers" or "peddlers." In this case it is unnecessary to rely on the authorities above quoted. In addition to the definitions quoted from the opinion of Mr. Justice Day in Crenshaw vs. Arkansas, supra, we may refer to the language of Mr. Chief Justice Groesbeck in *Clements v. Town of Casper*, 4 Wyo. 494 (1893), at pages 500-501:

> "The words 'peddler' and 'hawker' have a settled meaning independently of statutory definition. The former is an itinerant trader, a person who sells small wares which he carries with him in traveling about from place to place, while the latter is also a trader who goes from place to place, or along the streets of a town, selling the goods which he carries with him, although it is generally understood from the word that a hawker also seeks for purchasers, either by outcry, as the derivation of the word would seem to indicate, or by attracting notice and attention to them, as goods for sale by actual exposure or exhibition of them by placards or labels or by some conventional signal or noise. Of such occupations the state has control, and under the authority derived from the general incorporation act of the state, under which the town of Casper was incorporated, 'to license, tax, regulate, suppress and prohibit hucksters, peddlers', etc. (Rev. Stat., 468, subdivision 9th), the town has a right to enact ordinances governing such occupations and

regulating, licensing, taxing or prohibiting them. But the ordinance goes further than this and attempts to do what has been unsuccessfully attempted time and again, for the benefit and advantage of domestic dealers, to exclude the agents of dealers from other states, and this cannot be done, as the property offered for sale is not under the jurisdiction of or subject to regulation by the state or its municipalities, and is not carried about from place to place and exhibited for sale. The definition of a peddler in section three of the ordinance is not the generally accepted one, and under the evidence adduced in the case, the plaintiff in error was not one, as the articles he sold were delivered in the future through an express agent. It may be that this definition is not an exclusive one, but may be considered as an enlargement of the usual term, but the evidence plainly shows that the plaintiff was not a peddler in the usual understanding of the term, nor in the light of the definition of the ordinance, as he neither carried about his goods from place to place within the town, nor sold and delivered them simultaneously, nor made future delivery of them through a storekeeper or merchant of the town. Even where a commercial traveler or agent, usually denominated a 'drummer', simply exhibits samples of goods kept for sale by his principal, and takes orders from purchasers for the goods, which are afterward to be delivered by the principal to the purchasers and payment for the goods is to be made to the principal by the purchasers on such delivery, such agent is neither a peddler nor merchant; nor even will a single sale or delivery of goods by such agent, or by any other person, out of the samples exhibited, or out of any other lot of goods, constitute such person or other person a peddler or merchant. City of Kansas v. Collins, 34 Kans., 434, and cases cited; Commonwealth v. Farnum, 114 Mass., 267."

It is quite plain from the cases which have been cited that the commerce clause of the Federal Constitution prohibits the imposition of any tax by a state or municipality on the doing of interstate business by salesmen or delivery men. If the statute or ordinance imposing the tax makes any discrimination against non-residents of the state in favor of residents or against imported goods in favor of domestic goods, it may be attacked on still other grounds as, e. g., that it violates Article Four, Section 2 of the Constitution of the United States, which provides that "The citizens of each state shall be entitled to *all privileges and immunities of citizens in the several states*," or the fourteenth amendment which provides that "No state shall make or enforce any

law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; *nor deny to any within its jurisdiction the equal protection of the laws.*" Even where the tax is imposed on peddlers in the proper sense of the term it is invalid as applied to a person against whom it makes such a discrimination. Of the many cases which might be referred to we shall instance only two decided by the United States Supreme court:

Welton vs. State of Missouri, 91 U. S. 275 (1875).—The defendant, a dealer in sewing machines manufactured outside the state of Missouri, went from place to place in that state selling them without a license. He was convicted under a statute of the state declaring that whoever sold goods, not the produce of the state, by going from place to place to sell the same should be deemed a peddler and should not so deal without a license, and prescribing the rates for licenses varying according to the manner of conducting the business. No license was required for selling goods which were the produce of the state. Judgment of conviction was reversed by the United States Supreme Court in a unanimous opinion by Mr. Justice Field. The Court's reasoning may be outlined as follows: Where a business consists in the sale of goods a license tax required for its pursuit is in effect a tax on the goods. Where the subject to which the power to regulate commerce applies is national in its character or admits of uniformity of regulation, the power is exclusive of all State authority. The transportation and exchange of commodities is such a subject and the commercial power continues till the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. The inaction of Congress is equivalent to a declaration that interstate commerce shall be free and untrammeled.

Walling vs. Michigan, 116 U. S. 446 (1886).—In 1875 the Michigan legislature passed an act taxing any person engaged in selling or soliciting orders for the sale in Michigan of liquors imported into the state, three hundred dollars per annum.' In 1881 it passed an act taxing any manufacturer or dealer in liquors at his principal place of business, five hundred dollars. The plaintiff was convicted, under the first statute, of selling and soliciting orders for the sale of liquors, to be shipped from Illinois wholesale, without a license. The judgment was reversed by the United States Supreme Court in a unanimous opinion by Mr. Justice Bradley. The reasoning of the court may be outlines as follows: A discriminating tax imposed by a state operating to the

disadvantage of produce of other states introduced into the first mentioned state is a regulation in restraint of commerce among the states and a usurpation of the power of Congress. The tax of 1875 is not imposed on the same class of persons as the tax of 1881 and this gives an immense advantage to the product manufactured in Michigan and to the manufacturers and dealers of that state. The police power cannot be set up to control the inhibitions of the Federal Constitution.

CHAPTER III.

ALABAMA.

U. S. Supreme Court Decisions.

Dozier vs. Alabama, 218 U. S. 124 (1910).

State Court Decisions.

State vs. Agee, 83 Ala. 110.
Ex parte Murray, 93 id. 78.
Stratford vs. Montgomery, 110 id. 619.

CHAPTER IV.

ARKANSAS.

U. S. Supreme Court Decisions.

Crenshaw vs. Arkansas, 227 U. S. 389 (1913).
Rogers vs. Arkansas, 227 U. S. 401 (1913).

CHAPTER V.

CALIFORNIA.

U. S. Supreme Court Decisions.

In re Tinsman, 95 Fed. 648.

As this case is often cited as an authority, it is published herein as follows:

An ordinance of Sausalito, California, provided that "It shall be unlawful for any person to engage in or carry on any business, trade, profession, or calling, for the transaction or carrying on of which a license is required, without first taking out or procuring the license required for such business, trade, profession or calling."

Tinsman was engaged in taking orders in the town of Sausalito for the enlargement of portraits by the Chicago Portrait Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, and having its principal place of business and factory in the City of Chicago, in said State. Said corporation had no warehouse, storehouse, or place of business in the State of California and its business was carried on by means of traveling agents or solicitors, who went from state to state, county to county, and town to town, soliciting orders for the enlargement of portraits. The orders were then by such agents and solicitors forwarded to the Company at its place of business in the City of Chicago, and there the portraits were enlarged, and after enlargement were returned, directed to said Company at the town or place where said orders were taken, and there called for by an agent of the said Company, and delivered to the persons who had ordered same. The petitioner was arrested, tried, and convicted in the Recorder's Court of the Town of Sausalito for transacting the business of soliciting orders for said Company without having first obtained a license so to do, as required by said ordinance; and there-

after he was sentenced by the said Recorder's Court to pay a fine of $20, or serve a period of twenty days in the county jail.

He applied for a writ of *habeas corpus* to the Federal Court, which directed that he be discharged from custody. In making the order Judge Morrow said: "When a law of a state imposes a tax under such circumstances and with such effect as to constitute it a regulation of interstate commerce, it is void on that account. *Brown vs. Maryland*, 12 Wheat. 419; *Telegraph Company vs. Texas*, 105 U. S. 460; *Moran vs. New Orleans*, 112 U. S. 69, 73, 5 Sup. Ct. 38. An ordinance of a municipal corporation requiring persons or firms soliciting orders on behalf of manufacturers of goods to take out a license and pay a tax is an exercise, not of the police power, but of the taxing power; *and when enforced against a person or firm soliciting orders for a manufacturer of goods in another state, it imposes a tax upon, and is a regulation of interstate commerce, in violation of the provisions of the constitution of the United States.*" **********

"*It follows that the business of the petitioner is within the protection of the provision of the constitution of the United States relating to commerce among the several states, and the ordinance in question cannot be enforced against him. His imprisonment is therefore illegal, and he must be discharged.*"

In the town of **LEMOORE**, The Aluminum Cooking Utensil Company's salesman, Mr. L. F. Crumly, was arrested for soliciting orders without having paid the license as required by the municipal ordinances. The following report appears in THE LEMOORE LEADER, a weekly newspaper, issue of June 12, 1914:

CASE DISMISSED.

The case of the *City of Lemoore vs. L. F. Crumly*, agent for the Wear-Ever Aluminum Cooking Utensils, was given a hearing in the City Recorder's Court on Wednesday, the result being a decision favorable to Mr. Crumly. The case was one wherein the right of Mr. Crumly to solicit and deliver the goods of his Company within the City of Lemoore without first procuring a city license, was involved. After the manager for said Company had thoroughly explained their manner of doing business, it was evidently plain to the city officials that Mr. Crumly was operating clearly within the rights afforded him by the interstate commerce law in his particular case.

In the City of **OAKLAND**, California, The Aluminum Cooking Utensil Company's salesman, Mr. George R. Long, was arrested for soliciting orders without having paid the license as required by the municipal ordinances. The outcome of the case is reported in the following letter from Attorneys Nowlin, Fassett & Little:

T. W. Nowlin,
J. F. Fassett,
Ernest K. Little.
E. J. Little.

Phone, Douglas 4112.
Cable Address "Nowfas"

NOWLIN FASSETT & LITTLE
Attorneys at Law.
700–703 Foxcroft Building,
San Francisco, Cal.

June 23, 1914.

The Aluminum Cooking Utensil Co.,
Monadnock Building,
San Francisco, California.

Gentlemen:

In accordance with your request for a report on the case of *People vs. George R. Long*, we submit the following:

Your salesman, George R. Long, was arrested in the City of Oakland, charged with peddling without a license. The case was heard on June 20th, 1914, before Hon. Mortimer Smith, Judge of Department One of the Police Court, City of Oakland, California. The defendant plead not guilty. He, however, admitted that he had solicited orders in the City of Oakland, which orders were sent to your Portland office together with a requisition for the amount of goods called for in such orders and the goods were thereupon shipped to him and delivered by him to the customers and the money collected therefor.

On behalf of defendant, we suggested two questions (1) that the transaction being interstate in its nature was not subject to regulation by city ordinance, and (2) that the defendant was not peddling within the meaning of the city ordinance.

The court stated that he presumed that we would want a ruling on the first question as the discharge of the defendant on the second question might result in his immediately being arrested on the charge of soliciting orders without a license. The first proposition was thereupon argued and the court's attention called to the decisions of the

Supreme Court of the United States holding that such transactions were a part of interstate commerce and, therefore, not subject to state regulation, and we also cited to the court a decision by Judge Morrow, in the Federal Court of this District, (In re Tinsman, 95 Federal 648). In that case the defendant was arrested and convicted in the Police Court of Sausalito, Marion County, California, on a similar charge. The case came before Judge Morrow on a petition for a writ of *habeas corpus* and the prisoner was discharged, the court holding that the application of the ordinance to the defendant who was engaged in soliciting orders for goods to be shipped in interstate commerce would be a violation of the Constitution of the United States, which reserves to Congress the sole right to regulate interstate commerce.

The attention of Judge Smith was also called to the decision of the Supreme Court of the State of California in the case of *Mulford vs. Curry*, 163 Cal. 276, in which the court held that any fee or requirement imposed by an act of a State Legislature or by City Ordinance would be invalid and unconstitutional in its application to transactions involving commerce between the States. After argument the court ordered the defendant discharged.

Yours truly,

NOWLIN, FASSETT & LITTLE,

(Signed) ERNEST K. LITTLE

CHAPTER VI.

COLORADO.

State Court Decisions.

Anes vs. People, 25 Colo. 511.

CHAPTER VII.

CONNECTICUT.

RICHARD H. DEMING,
Attorney at Law,
36 Pearl Street,
HARTFORD, CONN.

October 27, 1913.

ALUMINUM COOKING UTENSIL CO.,
Pittsburgh, Pa.

Gentlemen:

On October 15, 1913, I interviewed John H. Light, Attorney General for the State of Connecticut, on the question of the liability of your agents under our Itinerant Vendors Law, Sec. 4662 General Statutes, Revision of 1902 and amendments. I set forth, in detail, the nature of the business, the manner of soliciting and selling and methods used by your agents in distributing your goods to prospective customers in this State in the following terms:

"The Aluminum Cooking Utensil Company is a Pennsylvania corporation having its principal office in the City of Pittsburgh, and its manufacturing plant at New Kensington, Pa., at which latter point alone it manufactures cooking utensils which are being sold in the State of Connecticut in the following manner: the Company in question employs traveling salesmen who carry samples of its utensils and who solicit orders by a house to house canvass. When orders are

received by the traveling salesmen they are forwarded to the offices of the Company at Pittsburgh and the orders are filled from its manufacturing plant at New Kensington, Pa. The goods are then shipped to the salesmen to be delivered to the respective purchasers. No goods are given to the salesmen except to fill orders actually received and the Company carries no stock of goods in any of the states, except Pennsylvania, as above indicated and a stock of goods at East St. Louis, Ill., and Portland, Oregon."

The Attorney General and I studied, in detail, the Connecticut statutes on Intinerant Vendors and the Connecticut cases based on those statutes. In my opinion the facts presented bring the case within the decisions of our Supreme Court in *State vs. Felterer*, 65 Connecticut 293 and in *State vs. Feingold*, 77 Connecticut 326. The Attorney General agreed with me fully in my interpretation of the law and expressly authorized me to quote him in this matter.

He said, "I am of the opinion that The Aluminum Cooking Utensil Company doing business as you have stated to me, can do business in the State of Connecticut through its agents who should not be molested by any local authorities in requiring of them licenses to sell its goods and ware in their respective jurisdictions; that a business conducted as The Aluminum Cooking Utensil Company conducts its business can be continued under the Interstate Commerce Law without restriction."

Yours very truly,

RICHARD H. DEMING.

CHAPTER VIII.

DISTRICT OF COLUMBIA.

U. S. Supreme Court Decisions.

Stoutenburgh vs. Hennick, 129 U. S. 141 (1889).

State Court Decisions.

In re Hennick, 5 Mackey, 489.

CHAPTER IX.

FLORIDA.

State Court Decisions.

Cason vs. Quinby, 53 So. 741.

Quinby having been a "WEAR-EVER" salesman a history of the case follows:

FIRST JUDICIAL CIRCUIT OF FLORIDA,

CIRCUIT COURT OF JACKSON COUNTY.

Ex Parte

U. B. QUINBY, *Habeas Corpus.*

Writ of Habeas Corpus having been issued this day upon the petition of U. B. Quinby, alleging that he was convicted of carrying on and conducting a business for which a license is required without first obtaining such license, to-wit:—that of soliciting orders for delivery of merchandise and collecting same, and had been sentenced by the Justice of the Pease to pay a fine of $75.00 and costs and in default of the payment of the fine and costs that he serve for and during the period of six months in the County jail at hard labor. And that he had not paid said fine and was held by the Constable of said Court under sentence and unlawfully detained and restrained of his liberty in the custody of said Constable, one James Cumerford, That said statute under which the charge is made is invalid in this: that the statute is in direct violation of the Interstate Commerce Laws of the United States, which prevent the licensing and taxing of parties selling goods through one State to another. That he is a traveling salesman for The Aluminum Cooking Utensil Co., of Pittsburgh, Pa., there located and that petitioner

sells the products of said Company by taking orders therefor which orders are mailed to the Company in Pennsylvania, which orders are taken and filled separately upon said orders and shipped into Florida to petitioner, who delivers the article so ordered to the original customer and collects the price therefor at the time of such delivery. That he does not carry around goods with him for sale and delivery, etc. That he is not guilty of violating any criminal statute against the laws of Florida nor of the United States.

Upon return of the writ, admitting the allegations of fact of the petition and setting up the Commitment of the said J. P. Court, the evidence used before said court being an admitted state of facts, it appeared that the petitioner had only solicited orders for goods for a firm outside of the State of Florida, and that the goods were shipped to him on these orders and delivered to the customers, who had given the orders, and that no sale was made of goods already within the State of Florida, before the taking of the orders therefor, the commissioner is of the opinion that the business so done is within the Interstate Commerce Law and that a license cannot be required by the State therefor. Re Spain 14 L. R. A., 97; *Brennan vs. Titusville*, 153 U. S. 289—38 L. ed. 719,—4 Interstate Commerce Reports 658, in addition to the case of *Gibbons vs. Ogden*, 9 Wheaton 1 to 240—6 L. ed. 23, etc.

It is therefore ordered that the petitioner be and he is hereby discharged from custody.

Done and ordered at Marianna, Jackson County, Florida, in the absence of the Circuit Judge of the First Judicial Circuit of Florida from the County of Jackson, this 29th day of April, A. D. 1910.

(Signed) Wm. B. Farley,
Circuit Court Commissioner for
Jackson County, Florida.

In "Cason," *Chief of Police vs. U. B. Quinby*, 53 South "741," the Supreme Court of Florida, Division A, June term, 1910, under date of November 29, 1910, confirmed the above judgment in habeas corpus, releasing U. B. Quinby from custody. Opinion by Judge C. J. Whitfield, with Judges Shackleford, Cockrell, Taylor, Hocker and Parkhill concurring.

Cora Kiplinger, C. E. Kiplinger and H. M. Kiplinger, all "WEAR-EVER" salesmen, were placed under formal arrest at the City of

ST. PETERSBURG, Florida, for refusing to take out a license. By mutual consent an agreed statement of facts was submitted informally to Circuit Judge J. B. Wall, of Tampa. The statement of facts and opinion of Judge Wall are as follows:

IN THE CIRCUIT COURT, SIXTH JUDICIAL CIRCUIT, HILLSBORO COUNTY, FLORIDA.

CORA KIPLINGER,
vs. APPEAL.
CITY OF ST. PETERSBURG.

Plaintiff above was arrested for a violation of Ordinance 189, Section A, Article 3, of the City of St. Petersburg, which reads as follows:

ORDINANCE 189.

An ordinance fixing license taxes for the year beginning November 1st, 1909, and for each succeeding year thereafter:

Section A, Article 3. Agents or traveling representatives of merchants selling from samples to persons other than resident merchants, per day $10.00.

C. E. Kiplinger and H. M. Kiplinger were also arrested for a violation of the same ordinance. All plead "not guilty" but admitted the selling by sample, and were fined each $50 and costs.

It was agreed by counsel for both sides in open court that the ordinance with a statement should be submitted to the Circuit Judge, Hon. J. B. Wall, permission given plaintiff to cite United States Supreme Court decision.

The plaintiff's position briefly stated is that she, and the other two mentioned, are the representatives of the Aluminum Cooking Utensil Co. of Pittsburg, Pa., who have no office, stores, storage or warerooms in the State of Florida. The sales of the above Company's goods are made by private demonstration in the house of some individual to whom others in the neighborhood are invited, orders are taken from purchasers, which orders are transmitted to the Pittsburg Cooking Utensil Company at their home office in Pittsburg, Pa., from where the goods are shipped in one package to some one of the three herein named, and by them delivered, and the collection made.

Therefore the plaintiff in pleading not guilty felt she had not violated any of the ordinances of the City of St. Petersburg, inasmuch as being engaged in interstate commerce her position being that such

ordinance would not apply to her business, she not making the sales of any of the samples which were shown.

In support of the plaintiff's position, she cites the United States Supreme Court, Vol. 185, Page 27, and the decisions there cited.

Respectfully submitted,
(Signed) J. S. Davis,
Attorney for Plaintiff.

(Signed) Grant Aiken,
Attorney for the City of St. Petersburg.

J. B. WALL
Judge of the Sixth Judicial Circuit of Florida.

Tampa, Fla., January 19, 1910

Hon. H. A. Murphy,
Mayor of St. Petersburg,
St. Petersburg, Fla.

Dear Sir:

A question has been informally submitted to me as to whether or not your City has the power to impose upon traveling agents of a Mercantile Co. or manufacturer whose business is wholly outside this State a license tax, or fee for exhibiting, and selling by sample, to residents of your City, the wares of their Company. The Supreme Court of the United States has recently held that such cannot be done, on the ground that it conflicts with that provision of the Federal Constitution which inhibits state legislatures from passing acts which would regulate, or interfere with commerce between the States.

I have no hesitancy in advising you that, in my opinion, the ordinance cannot be enforced.

Yours truly,
J. B. Wall,
Circuit Judge.

CHAPTER X.

GEORGIA.

State Court Decisions.

Wrought Iron Range Co. vs. Johnson, 84 Ga. 754.

McClelland vs. Marietta, 96 id. 749.

Stone vs. State, 117 id. 292.

Kehrer vs. Stewart, 117 id. 969.

CHAPTER XI.

IDAHO.

Tom Driscoll, a "WEAR-EVER" salesman, working in the State of Idaho, was informed by the municipal authorities that a license would be required. His father, Mr. Tim Driscoll, an attorney at Payette, Idaho, addressed a letter to the office of the Attorney General of the State, and the opinion of Assistant Attorney General, O. M. VanDuyn follows:

D. C. McDougall,
Attorney General.

Jos. H. Peterson,
Owen M. VanDuyn,
Assistants.

STATE OF IDAHO.

Office of the Attorney General.

Boise, July 18, 1911.

Hon. Tim Driscoll,
Payette, Idaho.

Dear Sir:

I have just received your letter of July 17th, 1911, in which you ask my opinion in regard to whether or not one taking orders within the State of Idaho and delivering goods not at the time of taking orders but thereafter is subject to a peddler's or hawker's license. The rule of law is as laid down by the Supreme Court in re Kinyon, 9 Idaho, Page 642, and in re Abel, 10 Idaho, 288, that one who takes orders in the State of Idaho and is not the owner of the goods, and does not deliver at the time of taking the order, but delivers thereafter and from another State is not subject to a peddler's or hawker's license. In re Kinyon, there is a digest of all the pertinent authorities upon this question among which are many cases of the Supreme Court of the United States.

Any restriction requiring parties of the kind mentioned in this decision to take out a license is contrary to Sec. 8, Art. 1, of the Constitution of the United States, in that it is an attempt to regulate or interfere with Interstate Commerce.

It must always be borne in mind, however, that if the party taking the orders has the goods with him in the State of Idaho, and delivers at the time of taking the orders, he will then be subject to a license-tax—otherwise he will not.

Yours very respectfully,
O. M. VanDuyn,
Assistant Attorney General.

CHAPTER XII.

ILLINOIS.

In this State the Company maintains a warehouse and shipping depot at East St. Louis, in St. Clair County. As shipments to all salesmen within the State are made from the East St. Louis warehouse the Interstate Commerce defense cannot be used. However, "WEAR-EVER" salesmen are exempt from the payment of municipal licenses under the laws and decisions of Illinois as shown in the following brief of Messrs. Kramer, Kramer & Campbell of East St. Louis:

Edward C. Kramer,
Rudolph J. Kramer,
Bruce A. Campbell,
William H. Hebenstreit,
Ferdinand W. Abt.

KRAMER KRAMER & CAMPBELL,
Attorneys at Law,
Rooms 624–633 Murphy Building,
East St. Louis, Illinois.

BRIEF OF AUTHORITIES EXEMPTING SALESMEN AND DELIVERYMEN ENGAGED IN SOLICITING ORDERS FOR FUTURE DELIVERY FOR THE ALUMINUM COOKING UTENSIL COMPANY, DELIVERY TO BE MADE FROM ITS WAREHOUSE IN EAST ST. LOUIS, ILLINOIS, FROM LICENSE TAXES IMPOSED BY MUNICIPALITIES WITHIN THE STATE OF ILLINOIS.

Municipalities of the State of Illinois have only such power to impose license taxes as are conferred upon them by the State of Illinois.

The General Assembly of the State of Illinois, by the general Act of 1872, in Paragraph 41 of Section 1, of Article 5, Jones & Addington

Illinois Statutes Annotated, Vol. 1, Page 938, conferred upon the city council in cities and president and board of trustees in villages and incorporated towns the power to "license, tax, regulate, suppress and prohibit hawkers, peddlers, etc."

In 1887 the General Assembly of the State of Illinois passed an Act entitled, "An Act to extend the powers of the city council in cities and the president and board of trustees in villages and incorporated towns," Jones & Addington Illinois Statutes Annotated, Vol. 2, Page 1229, wherein it was provided that the city council in cities and president and board of trustees in villages and incorporated towns shall have power to license, tax, regulate, suppress or prohibit itinerant merchants and transient venders of merchandise.

These are the only powers that have been conferred by the State of Illinois upon cities, villages and towns to levy such license taxes, and the question, therefore, for determination is whether or not the agents of the Aluminum Cooking Utensil Company who solicit orders for future delivery are "peddlers, hawkers, itinerant merchants or transient venders of merchandise." Under the holdings of the Courts of Illinois they do not come within any of these.

We hardly deem it necessary to cite authorities upon the question that cities and villages have only such authority to levy license taxes as is conferred upon them by the State of Illinois. However, our Courts have passed upon this question and we cite the following authorities:

City of Chicago vs. Blair, 149 Ill., 310.

Seeger vs. Mueller, 133 Ill., 86.

In the case of the *City of Chicago vs. Blair*, 149 Ill., 310, the Court says, on Page 318 of the opinion:

> "The tendency of municipal government to arrogate to itself power and to encroach upon the rights of the citizen has led to the establishment of the statutory rules of construction limiting its powers to those expressly granted, or arising by reasonable and necessary implication, from the grant."

AGENTS WHO SOLICIT ORDERS FOR FUTURE DELIVERY ARE NOT PEDDLERS OR HAWKERS.

Rawlings vs. Village of Cerro Gordo, 32 Ill., App., 215; Affirmed 135 Ill., 36.

City of Olney vs. Todd, 47 Ill., App. 439.

Emmons vs. City of Lewistown, 132 Ill., 380; 8 L. R. A., 328; 22 Am. St., 540.

Twinning vs. City of Elgin, 38 Ill., App., 356.

In the case of *Emmons vs. City of Lewistown*, supra, Emmons was a resident of Logan County, Illinois, and was engaged in the City of Lewistown, in canvassing and taking orders for the sale of books to be paid for by the purchaser when delivered, and was arrested for violating an ordinance of the city prohibiting canvassing for books or taking orders in the City of Lewistown without a license.

It was admitted upon the trial that appellant was, at the time of his arrest, actually engaged in soliciting and taking orders for the books from house to house within the limits of the city and that he had not procured license under the city ordinance.

The Court says that the question of interstate commerce is in the case because the house for which Emmons was canvassing was located in St. Louis, Missouri, and they say that that question is involved if the ordinance is otherwise valid, but they hold that is is not necessary to determine the question of interstate commerce because the ordinance is invalid on other grounds. The Court says that the only power, if any, conferred upon the City of Lewistown to license Emmons is contained in the power given by the Legislature to cities and villages to license and prohibit hawkers and peddlers, and that unless the business that he was doing comes within the designation of hawkers and peddlers the city council had no power to require him to pay a license.

The Court then quotes the *City of Chicago vs. Bartee*, 100 Ill., 61, where it is held that the term "peddler" as used in this statute was to be taken in its general and unrestricted sense and embraces all persons engaged in going through the city from house to house and selling commodities. Abbott's Law Dictionary is quoted in support of the definition, as are Tomlin, Bouvier and Webster. After reviewing the authorities relative to the definition of "hawker" and "peddler," the Court says, on Page 384 of the opinion:

> "This list of definitions might be extended almost indefinitely, but enough has been given to show both the legal and popular meaning of the words 'hawker' and 'peddler.' It has never been understood, either by the profession or the people, that one who is ordinarily styled a 'drummer,'—that is, one who sells to retail dealers or others by sample,—is either a hawker or a peddler; and

the same is true in respect of persons who canvass, taking orders for the future delivery of books and periodicals or other publications. It is a fundamental canon of construction, that the legislature must be presumed to have used these words in their known and accepted signification, and intended thereby to confer upon the city and village authorities power to license, regulate and prohibit only such callings and vocations as might fall within the terms employed in the act as thus known and understood. To concede that the power of the city to license, tax or regulate the canvassing for books or publications within the city is doubtful, is to deny the power."

And the Court further says, on Page 385 of the opinion:

"While it must be conceded that the evil resulting from the method of canvassing from house to house may be great,—indeed, as great as that resulting from the vocations authorized by the statute to be taxed and regulated, and, indeed, may be even greater,—yet, if the legislature, as we are constrained to hold, has not conferred upon cities and villages the power to tax or regulate the same, if relief is to be obtained, resort must be had to the legislative department of the state.

We are of opinion that so much of the ordinance as prohibits canvassing for books and publications in said city without obtaining a license therefore is void, for want of power in the city authorities to ordain the same, and appellant, not falling within the designation of a 'hawker' or 'peddler', was not amendable to prosecution under the valid portions of said ordinance."

In the case of the *Village of Cerro Gordo vs. Rawlings*, 135 Ill., 36, on Page 40 the Court, in its opinion, says:

"The evidence introduced on the trial in the circuit court showed that Rawlings went about the village carrying a case containing samples of sugar, tea, coffee, etc., and that he took orders for goods, addressed to Q. W. Lovering Co., of Chicago, by whom the orders were to be filled and the goods sent by express, C. O. D. to the persons giving the orders, and he represented that he was the authorized agent of said firm. That this mode of doing business did not constitute Rawlings a peddler is expressly decided in *Emmons vs. City of Lewistown*, 132 Ill., 380. We have carefully examined the brief and argument of counsel for appellant, and find no sufficient reason for departing from the views there expressed.

The judgment of the Appellate Court is in harmony with that decision, and must be affirmed."

AGENTS WHO SOLICIT ORDERS FOR FUTURE DELIVERY ARE NOT ITINERANT MERCHANTS OR TRANSIENT VENDERS OF MERCHANDISE.

City of Carrollton vs. Bazzette, 159 Ill., 284; 31 L. R. A., 522.

City of Waterloo vs. Heely, 81 Ill., App., 310.

Nagele vs. City of Centralia, 81 App., 334.

City of Peoria vs. Guggenheim, 61 Ill., App., 374.

Twinning vs. City of Elgin, 38 Ill., App., 356.

In the case of the *City of Waterloo vs. Heely*, 81 Ill. App., 310, on Page 313 of the opinion the Court says:

> "Appellee was an employee of the firm of McCullough & Reincke, merchants permenantly located and doing business in the City of Belleville, in this State, dealing in tea, coffee, spices and other articles of merchandise, and as such employee appellee solicited and took orders for the sale of coffee, tea and spices, to be delivered on a future day to several persons, householders within the City of Waterloo, for their own consumption, the orders being taken and the goods afterward and on a certain future day delivered by and paid for to appellee, within the limits of the City, without a license from the City. For these acts appellee was arrested on the charge of violating an ordinance of the City, and after a trial before a police magistrate, was found guilty, and fined $2 and costs."

From this judgment he appealed to the Circuit Court of Monroe County where trial was had and he was found not guilty. The City took an appeal to the Appellate Court.

Section 2 of the ordinance which it is claimed was violated provides for the licensing of persons who shall solicit orders within the City, which are to be delivered on a future day. The Court on Page 314, says:

> "The ordinance was evidently intended by its makers to be based upon the power given to the City, under an act of legislature in force July 1, 1887, which reads as follows:
>
> > 'That the city council in cities, and the president and board of trustees in villages and incorporated towns, shall have the power to license, tax, regulate, suppress or prohibit itinerant merchants and transient venders of merchandise.'
>
> It is further evident that the makers of the ordinance intended it should embrace cases like this, and we are asked to give the law a liberal construction, if necessary, to make it potential to sustain the intent of the makers of the ordinance."

The Court concludes, in its opinion on Page 316:

> "He was, in our opinion, no more an itinerant merchant or transient vender of merchandise, in what he did, than he would have been had he sat quietly in the store of his employers in Belleville and talked with his customers in Waterloo through the telephone and sent the goods to purchasers by delivery wagon with the bills for them to be collected on delivery of the goods.
>
> It is unnecessary to inquire whether any of the acts appellee did make him amendable to the provision of the ordinance until we first determine that the city council had the power, under the law, to requite him to take out a license to do the acts; and since we hold that appellee was neither an itinerant merchant nor a transient vender of merchandise, it follows that the judgment of the Circuit Court was right, and hence it is affirmed."

In the case of *Twinning vs. City of Elgin*, 38 Ill., App., 356, the Court says:

> "Indeed, the term 'peddler,' 'transient vender of merchandise and itinerant merchant' means and implies persons who sell and deliver goods, wares or merchandise or who barter or exchange on delivery thereof other commodities therefor. We understand that the terms 'itinerant merchant' and 'transient vender of merchandise' as used in the Act of June 16, 1887, Laws 1887, Page 117, mean and were intended to apply to those persons who for a short space of time locate in a city and make sale and delivery of their goods, as other merchants do, or those who carry or transport their goods from house to house, or place to place, and make sale and delivery of their goods in like manner as other merchants and salesmen do.
>
> If we are correct in the foregoing premises, it must follow that appellant was not at the time of the act complained of pursuing the vocation of 'peddler,' 'itinerant merchant' and 'transient vender of merchandise,' making sale and delivery of goods contemplated by and within the meaning of the statute above cited, but was pursuing the vocation of a 'drummer,' that is, one who solicits trade for retail dealers or others by sample, or one whose business it is to canvass and take orders for future delivery."

In the case of *Nagele vs. City of Centralia*, 81 Ill. App., 334, the same doctrine is laid down. It is true that this latter decision was reversed by the Supreme Court but solely upon the ground that the Appellate Court erred in awarding execution against the City which, under our law, cannot be done.

We are therefore of the opinion that so long as you conduct business in the present manner, that is, solicit orders for goods for future delivery and then on delivery collect therefor, the city council in cities and the president and board of trustees in villages and incorporated towns have no power to license your salesmen or deliverymen.

We deem it unnecessary to discuss other matters that might come up in relation to some particular ordinance, such as invalidity on account of discrimination between classes or persons, etc., because that would merely be a technical defense to a particular ordinance and would have no bearing on the general question of the power of cities and villages to license our salesmen and deliverymen.

Respectfully submitted,
KRAMER, KRAMER & CAMPBELL,
Attorneys at Law, East St. Louis, Ill.

The opinion of Messrs. Kramer, Kramer & Campbell as outlined in the foregoing brief is supported by Attorney General P. J. Lucey, whose letter follows. Mr. Lucey not only supports the opinion of Messrs. Kramer, Kramer & Campbell as concerns intrastate shipments but also confirms the protection of interstate commerce in event the goods are shipped from outside of the State.

STATE OF ILLINOIS,
OFFICE OF THE ATTORNEY GENERAL,
Springfield.

P. J. LUCEY,
Attorney General.

October 13, 1913.

CITIES AND VILLAGES:
Powers—Licensing Solicitors.

E. C. KRAMER, ESQ.,
Attorney at Law,
Rooms 624–633 Murphy Building,
East St. Louis, Illinois.

Dear Sir:

I am in receipt of your communication of the 8th instant, from which it appears that,

> "The home office of the Aluminum Cooking Utensil Co. is at New Kensington, Pennsylvania. It also has a warehouse in the City of East St. Louis. It has canvassers

in the State of Illinois taking orders for goods where the orders are filled from the home office at New Kensington, Pa. It also has canvassers in the State of Illinois, taking orders that are filled from the warehouse in the City of East St. Louis. In no case do these canvassers deliver goods at the time the orders are taken, but simply take orders for the same, forward them either to the home office at New Kensington, Pa., or at East St. Louis, where, if they are accepted, the orders are filled and the goods afterwards shipped."

You request my opinion upon the two points involved in the above quoted statement of facts. You enclose a brief in support of your conclusion as to the law applicable to the facts, which conclusion is, in substance, as follows:

First:—That where orders are taken by canvassers or solicitors for orders in Illinois for a foreign corporation to be afterwards approved or rejected by said foreign corporation at its home office and, if they are approved and accepted, to be filled by shipment of goods from its home office in such other State, such transactions constitute interstate commerce, and municipalities in the State of Illinois have no right to require such canvassers or solicitors to obtain a license from cities, villages and incorporated towns; that all ordinances of such cities, villages and incorporated towns requiring a license in such cases constitute an unconstitutional burden on interstate commerce, and, therefore, beyond the police powers of the State.

Second:—That cities, villages and incorporated towns have no power by ordinance to impose upon canvassers or solicitors for orders in Illinois for a foreign corporation, even though such orders are afterwards approved, accepted and filled from a warehouse in this State, of such foreign corporation, not because such transactions constitute interstate commerce, as in the other case above stated, but because the legislature has not delegated to cities, villages and incorporated towns the power to require a license in such cases; that the legislature has conferred upon cities, villages and incorporated towns the power by ordinance to require hawkers, peddlers, itinerant merchants and itinerant venders of merchandise to pay a license fee, but that canvassers taking orders for goods to be afterwards shipped, even though such orders be filled and the goods shipped from a warehouse located in this State and belonging to such foreign corporation, do not come within any of these classes; and that the courts of Illinois have held that canvassers or solicitors for orders for goods to be afterwards filled, shipped and delivered are not hawkers, peddlers, itinerant merchants or itinerant venders of merchandise within the meaning of the provisions of the cities and villages act.

It has been the uniform policy of this department to decline to give unofficial opinions under the circumstances here presented. Since, however, this department has repeatedly passed on these provisions, it would not be a departure from the rule, and I see no impropriety in advising you that your contentions and conclusions as to the law in such cases are in harmony with the repeated holdings of this department.

I return herewith the brief submitted with your letter.

Very respectfully,
P. J. Lucey,
Attorney General.

2-P.
Enclosures.

CHAPTER XIII.

INDIANA.

U. S. Supreme Court Decisions.

Pabst Brewing Co. vs. City of Terre Haute, 98 Fed. 330 (C. C., D. Indiana—1899).

State Court Decisions.

Martin vs. Rosedale, 130 Ind. 109.

Huntington vs. Mahan, 142 id. 695.

John E. Gibson, a "WEAR-EVER" salesman, was arrested at **EVANSVILLE,** Indiana, for refusing to take out a license. The case was contested in the City Court and is reported as follows by Mr. Gibson's attorneys:

RAEBER & DOWNEY,
Attorneys and Counselors,
EVANSVILLE, IND.

April 22, 1910.

THE ALUMINUM COOKING UTENSIL CO.,

Pittsburgh, Pa.

Gentlemen:

The facts in the case of the City of Evansville vs. John E. Gibson are as follows:

The defendant was arrested on April 5th, 1910, for violating Sections 47 and 49 of an ordinance of the City of Evansville, Indiana.

Section 47 of said ordinance reads as follows: "It shall be unlawful for any person, either by himself or agent, to transact any business, or do any act without procuring a license from the city authorities therefor, when such license is required by an ordinance of the city heretofore passed or hereafter to be passed." Section 49 provides for the recovery of any sum not exceeding Fifty Dollars for violation of any of the provisions of said ordinance.

The City of Evansville had in force on said day an ordinance declaring it to be unlawful for any person to engage in the business of hawking or peddling in said city or to take orders for goods, wares, or other articles or things, for immediate or future delivery, without first having procured a license.

The case came up for trial in the City Court of the City of Evansville and the defendant entered a plea of "Not Guilty."

The defendant made a motion to quash the complaint on the ground that it did not allege the date on which the ordinance was passed. At the suggestion of the Court it was agreed to let the Court hear the evidence and the arguments and he would decide on the sufficiency of the complaint later, and as to whether or not there was any liability on the defendant's part.

Counsel for defendant made a statement to the Court as follows: "The defendant, John E. Gibson, is employed by The Aluminum Cooking Utensil Co. of Pittsburgh, Pa., to sell its goods, which consists of utensils used for cooking purposes. The Aluminum Cooking Utensil Co. is a corporation organized under the laws of Pennsylvania, and a citizen of that state, with its place of business at Pittsburgh, Pa. The method used by Gibson to sell the goods is to carry a line of samples from door to door, and if he finds anything he exhibits is wanted by the householder he takes the order for it. No sample in the hands of defendant was ever sold. The orders are consolidated by him and sent in to the company at Pittsburgh, where they are filled. The goods are placed in one or more boxes and consigned to defendant, to be by him delivered as soon as received. None of the goods sold by defendant were in the state at the time of taking the order."

The prosecuting attorney agreed to the above statement of facts, and no evidence was introduced.

In our argument we contended that as the goods had not, at the time of their sale, come into the state, had not become mingled with the mass of property within this state, were not subject to inspection

and delivery at the time of the sale, the soliciting of orders and the subsequent shipment and delivery from another state were transactions of interstate commerce, which transactions could neither be prohibited nor regulated by the state or its municipalities, therefore the ordinance defendant was charged with violating was void as to him.

The court discharged the defendant on the ground that the complaint was bad and gave as his opinion that the defendant would not be liable, under the ordinance, for selling goods as he did.

Very truly yours,

(Signed) RAEBER & DOWNEY.

CHAPTER XIV.

IOWA.

A "WEAR-EVER" salesman, ———— Hunter, in 1905, was notified by the town authorities at Spencer, Iowa, that he would be required to pay a license. Attorney G. H. Martin, who happened to be the Mayor of the town at the time, upon learning the exact nature of the business, withdrew the demand for license. His opinion follows:

Office of
G. H. MARTIN,
Attorney at Law,
SPENCER, IOWA.

Attorney for
C., M. & ST. P. RAILWAY,
C., R. I. & P. RAILWAY,
CITIZENS NATIONAL BANK.

SPENCER, IOWA, June 29, 1905.

THE ALUMINUM COOKING UTENSIL COMPANY,
Pittsburgh, Pa.

Gentlemen:

Replying to your letter of June 24, 1905, will say that on my return to Spencer, Mr. Hunter called to see me and on learning your plan of doing business, I told him that no license would be required. He told me that this was in substance the plan of doing business: that he took the orders for future delivery as the agent of your Company; that the orders were sent to the Company, the goods shipped; that he delivered the goods as the agent of the Company and collected the price of the goods as your agent and retained therefrom his commission,

remitting the remainder to you. That puts you in the Interstate Commerce class and my city through no act of mine will become involved in litigation through such a state of facts. So long as your representatives confine themselves to this line of business they will not be interfered with by our city.

Very truly yours,

(Signed) G. H. MARTIN,

(Mayor of Spencer, Iowa.)

Attorney General,
GEORGE COSSON.

Assistant Attorneys General,
JOHN FLETCHER,
C. A. ROBBINS.

Special Counsel,
HENRY E. SAMPSON.

STATE OF IOWA,
Department of Justice,
DES MOINES.

December 16, 1913.

E. B. EVANS, Dean, College of Law,
Drake University, Des Moines, Iowa.

Dear Sir:

Yours of the 9th, instant, addressed to the attorney general has been referred to me for reply.

Your question briefly stated is whether or not an agent taking orders in this state for cooking utensils or other products of aluminum produced and owned by the principal in another state where the order is accepted or rejected, according to the will of such owner, may lawfully be required to pay a peddler's license or other license tax in this state for engaging in the business of taking such orders.

In my judgment this question should be answered in the negative. In the case of *Robbins vs. Shelby Taxing District*, 120 U. S. 489, the Supreme Court of the United States reversed the judgment of the lower court, convicting the defendant of soliciting trade by use of samples of the firm for which he worked as a drummer, the firm having its place of business in Cincinnati and the conviction having taken place in the taxing district of Memphis, in the State of Tennessee, where he was engaged in taking the orders complained of. This reversal was placed

upon the ground that he was engaged in interstate commerce and that no state or municipality had the right to levy or impose a license tax upon such business. This case has been frequently cited and followed by the Supreme Court of the United States as well as by numerous other courts, and it may be stated that the law as set forth in the opinion of said case is well settled.

Your enclosures are herewith returned.

Yours truly,

Car-H C. A. Robbins.

CHAPTER XV.

KANSAS.

State Court Decisions.

Ft. Scott vs. Pelton, 39 Kan. 766.

State vs. Hickox, 64 id. 654.

In this state several "WEAR-EVER" salesmen have been interfered with at various times, their cases being fully explained in the following correspondence:

BELOIT, KANSAS,
December 17, 1908.

THE ALUMINUM COOKING UTENSIL CO.,
Pittsburgh, Pa.

Gentlemen:

In reply to your letter in relation to the litigation between your agents, E. C. Beamer and Ray Tice, and the city of **LINDSBORG** and Thorstenberg, Mayor, and Walter Stead, Marshall.

Beamer and Tice, two young men, students from Baker University, undertook to canvass the city of Lindsborg, Kansas, for your ware. They were arrested by the Marshall on an order of the Mayor, charged with a violation of a city ordinance which prohibited the soliciting of orders for merchandise of any kind without first obtaining a license. At your request I appeared as Attorney for the young men at their trial in the Police Court and argued that the ordinance was unconstitutional and wholly void, being in contravention of the Interstate clause of the Constitution of the United States. The Police Judge remarked that he was not a constitutional lawyer, and was not going

to pass on the constitutional question and that he was going to hold for the city anyway. The young men were fined $10.00 and the costs of the prosecution. They were then informed by the Mayor, Mr. N. J. Thorstenberg, that if they would pay this fine they could finish their canvass of the city without further molestation, but if they failed to do so and attempted to solicit further orders they would be arrested. The young men, knowing that they were backed by your Company, refused to pay the license and appealed to the District Court. They then went before Judge Galle and secured an order, temporarily restraining Mr. Thorstenberg and his Marshall from interfering with them in any way from finishing the canvass of the city for your goods. The young men, although thay had lost considerable time, went ahead under the protection of this order and are now completing the canvass of the town. At the December term of the District Court of McPherson County, Judge Galle held that the city ordinance was unconstitutional and void, quashed the complainted appealed from the Police Court and made an order forever and perpetually enjoining and restraining the present City Mayor and Marshall and their successors from in any way hindering or interfering with Mr. E. C. Beamer and Ray E. Tice in soliciting orders for the goods, wares and merchandise of The Aluminum Cooking Utensil Company, of Pittsburgh, Pa. The costs in both of the cases were assessed against the City Officials.

Yours truly,

(Signed) J. E. Tice,

Attorney for Aluminum Cooking Utensil Co.

i. e. Beamer and Tice.

State of Kansas, County of McPherson, as

In the District Court of said County and State.

E. C. Beamer and Ray E. Tice, a minor, by J. E. Tice Plaintiff

vs.

N. J. Thorstenberg and Alex Wallerstedt, Defendants.

JOURNAL ENTRY.

And now towit: on this second day of December being a day of the regular December term of the said Court, the plaintiff appeared before their attorneys, J. E. Tice and Frank O. Johnson, the defendants not appearing. It is found and adjudged by the Court that the said defendants had been duly served by summons but that they had failed to answer, demur or otherwise plead to plaintiff's petition filed herein, but were wholly in default.

And thereupon this case came up for trial, the plaintiff waived a jury in open Court, and the case was submitted to the Court upon the pleadings and the evidence of the plaintiff and it was found and adjudged by the Court that all the allegations in the plaintiff's petition contained are true.

It is therefore considered, ordered, and adjudged by the Court that the said defendants, N. J. Thorstenberg and Alex Wallerstedt, and each of them, their agents or successors in office, and each of them and all other persons, be and they are hereby forever enjoined and restrained from molesting, interfering or in any way hindering or interfering with the said plaintiffs, E. C. Beamer and Ray E. Tice or either of them in soliciting or receiving orders in the city of Lindsborg, Kansas, for the goods, wares, or merchandise of The Aluminum Cooking Utensil Company, of Pittsburgh, Pa., or from molesting, intimidating, hindering or in any way interfering with the said plaintiffs in delivering the goods, wares or merchandise of The Aluminum Cooking Utensil Company in the said city of Lindsborg, Kansas, and that the said defendants and each of them, their agents or successors in office and all other persons be and are hereby forever enjoined and restrained from arresting or attempting to arrest or from confining and attempting to confine in jail the said E. C. Beamer and Ray E. Tice or either of them for soliciting orders for and delivering goods, wares or merchandise of the said Aluminum Cooking Utensil Company in the City of Lindsborg, Kansas.

It was further ordered and adjudged by the Court that the said defendants pay the cost of this action taxed at $10.00 for which let execution issue forthwith.

P. J. Galle,
Judge.

CITY OF McPHERSON, KANSAS, VS. R. O. CHANEY.

In Police Court of the City.

McPherson, Kansas,
August 26, 1909.

Mr. G. B. Spath, Agent of
The Aluminum Cooking Utensil Co.

The charge was that Chaney violated a City ordinance by selling and delivering goods within the city without having either obtained a license or paid the fee therefor.

It appeared that this Company was principal and he agent, the principal being at Pittsburgh, Pa., and having agents over the several states and counties therein selling its goods manufactured outside of Kansas, and that the property sold and delivered was not the property of Chaney, but that he was in the nature of a drummer.

We for Chaney cited State vs. Hickox, 64 Kansas (Supreme Court), 650, and cases cited therein; also Robbins vs. Taxing District in Tennessee, 120 U. S. 694 bot. page 1 Brennan vs. Titusville 153 U. S. 719, bot. page.

We took the position that the argument was valid but that it could not apply in this case, for to apply was to interfere with Interstate Commerce and to collect a license fee was to levy a burden on the occupation or business of carrying it on. That the state may levy burdens of all within the state, but not upon houses or businesses outside of the state.

A manufacturer of goods in the state can send an agent into another state to solicit orders for the products of the manufactory without paying to the latter state a tax for the privilege of trying to sell his goods. The police power of the state must give way to the inhibition of the Federal Constitution, or the powers of the U. S. Government created thereby. That a license tax required for the sale of goods under such condition, is in effect a tax upon the goods themselves. A license tax imposed by a state upon an agent of a citizen or another state for the privilege of selling his goods in the former state is a direct burden on Interstate Commerce and therefore beyond the power of the State.

The Police Judge held with us that the ordinance was valid but could not apply in cases like the above. Were the house and the agent both of Kansas then no Interstate Commerce would be involved and the license would have to be paid or be subject to a fine.

The case was heard on its merits and Mr. Chaney was discharged at the cost of the City.

Very sincerely yours,

GRATTAN & GRATTAN,

(Signed) G. F. GRATTAN.

In the town of **ONAGA,** The Aluminum Cooking Utensil Company's salesman, Mr. Ralph S. Hawkins, was arrested April 23, 1912, for soliciting orders without having paid a license as required by the municipal ordinances.

The conclusion is reported in the following letter:

W. F. Challis. E. C. Brookens.

CHALLIS & BROOKENS,
Attorneys at Law,
Westmoreland, Kansas.

September 10, 1912.

The Aluminum Cooking Utensil Co.,
East St. Louis, Illinois.

Gentlemen:— In re City of Onaga vs. R. S. Hawkins.

This case was dismissed by the city at their cost.**

We think the city will now be good to agents representing your company.

Yours truly,
CHALLIS & BROOKENS.

In the town of Marion, The Aluminum Cooking Utensil Company's salesmen, Messrs. Aaron Coleman and W. A. Huxman, were arrested August 14, 1913, for soliciting orders without having paid a license as required by the municipal ordinances.

The conclusion is reported in the following letter.

W. H. CARPENTER,
Attorney at Law,
Marion, Kansas.

Marion, Kansas, August 21, 1913.

Aluminum Cooking Utensil Co.,
East St. Louis, Ill.

Gentlemen:

I am pleased to report to you that both of your agents were discharged upon the hearing before the Police Court.

Mr. Huxman's partner was arrested last Saturday when he came in, after Mr. Huxman had been arrested, and we tried both cases yesterday, and the Court discharged the defendants basing his decision on the case of the City of Ft. Scott vs. Pelton, 39th Kansas, 674. Upon going through my library I found a large number of cases, all of which seemed to sustain our contentions, but the Court seemed to be controlled by the Kansas case; and said if it were not for the Kansas case, he would have convicted the fellows**********.

Yours respectfully,
W. H. Carpenter.

STATE OF KANSAS
EXECUTIVE DEPARTMENT
OFFICE OF ATTORNEY-GENERAL
TOPEKA, KANSAS

JOHN S. DAWSON, ATTORNEY-GENERAL
S. R. HAWKES, Asst ATTORNEY-GENERAL
S. M. BREWSTER, Asst ATTORNEY-GENERAL
JAMES P. COLEMAN, Office ASSISTANT

January 12, 1914.

Hon. J. W. Green,
Dean School of Law,
Kansas University,
Lawrence, Kansas.

My Dear Judge:-

I have your letter of January 6 and am somewhat familiar with the situation which you describe. If the college student during his summer vacation is taking orders in good faith for a business house located in another state and sends those orders to the business house for approval, that business is interstate commerce under the Drummer Cases with which every lawyer is familiar. However, the village town marshals and other petty police officers and license collectors cannot be expected to be greatly versed in the law relating to interstate commerce, and I know that in their zeal they sometimes overstep the limit of their authority, especially when they are dealing with the strangers within their gates.

I don't know how this matter can be corrected, except by an occasional damage suit for false imprisonment on the trumped-up charge of peddling without a license or something of that sort; nor do I see how the Attorney General can get into the matter where no specific case is involved, and no County Attorney or other public officer authorized to invoke the opinion of the Attorney General requests our interference.

Yours with kind regards,

John S. Dawson

Attorney General.

CHAPTER XVI.

KENTUCKY.

State Court Decisions.

Commonwealth vs. Pearl Laundry Co., 105 Ky. 259.

CHAPTER XVII.

LOUISIANA.

State Court Decisions.

Simmons Hardware Co. vs. McGuire, 39 La. Ann., 848.

McClellan vs. Pettigrew, 44 id. 356.

Pegues vs. Ray, 50 id. 574.

RUFFIN G. PLEASANT,
Attorney General.

WYLIE M. BARROW,
HARRY P. GAMBLE,
Assistant Attorney General.

G. ADOLPH GONDRAN,
Attorney in Charge
of Criminal Docket.

ATTORNEY GENERAL'S OFFICE,
STATE OF LOUISIANA,
Room 403, New Court Building.

NEW ORLEANS, LA., November 21, 1913.

HON. A. W. CONNELLY,
Sheriff of Terrebonne Parish,
Houma, La.

Dear Sir:

You write me that you have an inquiry from a gentleman who is contemplating putting canvassers in your parish, and who wishes to know whether they would be subject to the payment of a peddler's license. In your letter, you say that he explains the method of carrying on his business as follows:

"He is Agent for the Aluminum Cooking Utensil Company, a Pennsylvania corporation, having its principal office in the City of Pittsburg and its manufacturing plant at New Kensington, Penn., at which latter point alone it manufactures cooking utensils, which are being sold in the state of Louisiana in the following manner: The Company in question employs traveling salesmen, who carry samples of its utensils and who solicit orders by house to house canvass. When orders are taken by the traveling salesmen they are forwarded to the office of the company at Pittsburg and the orders are filled from its manufacturing plant at New Kensington, Penn., and the goods shipped to the salesmen to be delivered to respective purchasers. No goods are delivered to the salesmen, except to fill orders he has actually taken, previously, and sent to the plant at New Kensington, Penn., to be filled. No stocks of goods are kept in States except in Pennsylvania, Illinois and Oregon."

If he faithfully observes the foregoing method of doing business, I believe that he cannot be required to pay a license for the reason that he will be carrying on an interstate business, which is not subject to a license. Volume 21, page 794, A. & E. Enc. of Law lays down the following rule on the point raised:

"So long as goods imported into a State remain in the original packages, and are not mingled with the general mass of property in the State, their sale cannot be taxed or licensed.

"A State statute imposing a tax or a license is invalid in so far as it applies to canvassers, sample agents, or commercial travelers who represent principals doing business outside of the State, and who solicits orders, by sample or otherwise, in the sale of goods which have not yet been brought into the State or have not been taken from the original package. Interstate commerce cannot be taxed at all. Nor can the license or tax be imposed directly upon the foreign principal."

On this point, our Supreme Court is in line with the ruling above laid down. In the case of J. T. McClellan, Tax Collector, vs. R. L. Pettigrew, 44 Ann., page 357, the Supreme Court of Louisiana says:

"Whether the tax can be imposed, either directly on the goods introduced into the State, or by license on the party, who is entrusted with their sale, depends upon the fact, whether the goods have been incorporated into the general mass of property subject to taxation.

"If the manufacturer in another State sends an agent to Louisiana to find a purchaser for his manufactured goods, still at the factory, and he takes orders and the goods are shipped direct to the Agent to be delivered to the purchaser, he is not liable to said tax imposed by said Act. It is immaterial whether the sale is perfected by delivery. The clause of the Constitution of the United States, which declares that Congress shall have the power to regulate commerce among the several states, extends to negotiations for the sale of manufactured goods solicited in another State. Therefore any license tax imposed upon an agent or solicitor for soliciting orders for said goods, by sample, is in violation of said Clause of the Constitution of the United States."

See also W. T. Pegues, Tax Collector, vs. O. P. Ray, 50 Ann., page 574; Henderson vs. Ortte, 14 La., page 523.

The case of State vs. L. B. Price Mercantile Company, No. 20, 247 of the Docket of the Supreme Court, lately decided, relates to another point and does not cover the question presented here.

Very truly yours,

R. G. Pleasant,
Attorney General.

R. G. P.—S. B.

CHAPTER XVIII.

MARYLAND.

U. S. Supreme Court Decisions.

Brown vs. State of Maryland, 12 Wheat. 419 (1827).

Corson vs. Maryland, 120 U. S. 502 (1887).

CHAPTER XIX.

MICHIGAN.

U. S. Supreme Court Decisions.

Walling vs. Michigan, 116 U. S. 446 (1886).

State Court Decisions.

Coit vs. Sutton, 102 Michigan 324.

Wilcox Cordage Co. vs. Mosher, 114 id. 64.

People vs. Bunker, 128 id. 163.

STATE OF MICHIGAN
ATTORNEY GENERALS DEPARTMENT
LANSING

September 8, 1913.

GRANT FELLOWS ATTORNEY-GENERAL.
ANDREW B. DOUGHERTY DEPUTY.

Mr. William C. Brown,

Assistant Prosecuting Attorney,

Lansing, Michigan.

Dear Sir:-

I have your communication of September 5th, which reads in part as follows:

"The Aluminum Cooking Utensil Company is a Pennsylvania corporation having its principal office in the city of Pittsburg, and its manufacturing plant at New Kensington, Pa., at which later point alone it manufactures cooking utensils which are being sold in the State of Michigan in the following manner: the company in question employes traveling salesmen who carry samples of its utensils and who solicit orders by a house to house canvass. When orders are received by the traveling salesmen they are forwarded to the officers of the company Pittsburg and the orders are filled from its manufacturing plant at New Kensington, Pa., and the goods shipped to the salesmen to be delivered to the respective purchasers. No goods are given to the salesmen except to fill orders actually received and the company carries no stock of goods in any of the states except Pennsylvania, as above, indicated and a stock of goods at East St. Louis, Ill., and Portland, Oregon.

I would very much appreciate your official opinion as to whether or not the persons soliciting orders as above indicated are protected by the Federal Constitution to the extent that they could not be compelled to take out a license as a hawker or peddler under a state statute or a Village or City Ordinance."

In reply thereto would say, it is my opinion under the foregoing statement of facts, that persons who solicit orders do not come within the provisions of the hawkers and peddlers law and cannot be compelled to procure a Village or City License as a condition precedent to the right to solicit orders. The facts presented bring the case within the decision of our Supreme Court in People vs. Bunker 128 Michigan 160, which decision was subsequently approved in People vs. Stuart 167 Michigan 422.

Very respectfully,

Grant Fellows

Attorney General.

L-V-P

CHAPTER XX.

MINNESOTA.

In the city of **DULUTH,** The Aluminum Cooking Utensil Company's salesman, Mr. Joseph N. Fouchard, was arrested on September 9, 1911, for soliciting orders without having paid a license as required by the municipal ordinances.

The case is fully briefed in the following complaint and summary from the Court docket.

STATE OF MINNESOTA } ss.
COUNTY OF ST. LOUIS }

MUNICIPAL COURT

City of Duluth

R. J. Gillon, being duly sworn, makes complaint to the above named Court, and says that on the 9th day of September, A. D., 1911, at the city of Duluth, and within the corporate limits of said City of Duluth, in the County of St. Louis, and the State of Minnesota, one Joseph Fouchard, then and there being, did wrongfully, unlawfully and wilfully engage in the business of peddling and canvassing by then and there going about said city of Duluth offering for sale and canvassing for the sale of personal property, without being licensed to carry on said business by said city of Duluth, contrary to an ordinance of the City of Duluth, in such case made and provided, and against the peace and dignity of the State of Minnesota; offender might be arrested and dealt with according to law.

Wherefore, complainant prays that said offender may be arrested and dealt with according to law.

R. J. GILLON.

Sworn and subscribed to and complained of before me, at said City of Duluth, St. Louis County, Minnesota, this 12th day of September, A. D. 1911.

W. J. RICHESON,
Deputy Clerk of the Municipal Court.

By.....
Deputy Clerk

(SEAL)

CLERK'S DOCKET

THE CITY OF DULUTH
vs.
JOSEPH FOUCHARD

W. F. Dacey, attorney for plaintiff
Peddling without a license
E. J. Kenny, attorney for defendant

September 9th, 1911: Defendant arrested by officer Gillon without a warrant. September 11th, 1911: Defendant being in court pleads not guilty. Trial set for 2 P. M., September 12th, 1911, at which time the defendant is ordered to be and appear in court, and he is released without bail. September 12th, 1911, 2 P. M.: Case called. Defendant in court. Complaint of R. J. Gillon, filed. Defendant waives the reading of the complaint and pleads not guilty. Trial set for 2 P. M. September 13th, 1911, at which time defendant is ordered to be and appear in court, and he is released. September 13th, 1911, 11:30 A. M.: Case called. Defendant in court. R. J. Gillon called, sworn and testifies for the State. Recess taken until 2 P. M. to-day.

September 13th, 1911, 2 P. M.: Case called. Defendant in court. State rests. Joseph Fouchard called, sworn and testifies for the defendant. Defendant rests. C. H. Troyer called, sworn and testifies in rebuttal for the State. State rests. Case continued until 2. P M., September 18th, 1911.

September 18th, 1911, 2 P. M.: Case called. Defendant in court. The Court adjudges the defendant not guilty. Defendant discharged.

J. G. Ross, Clerk of the Court.
By M. S. LLOYD, Deputy.

MINNEAPOLIS, MINN., July 11, 1913.

MR. C. L. WEEKS,
Assistant Attorney General,
St. Paul, Minn.

My Dear Sir:—

I have a client who is Northwestern Sales Manager of The Aluminum Cooking Utensil Company, of New Kensington, Pa. This concern has a branch office and warehouse at East St. Louis, Ill., and also at Portland, Ore. A large part of its business is transacted through advertising salesmen who demonstrate and take orders for future delivery. The goods handled by these advertising salesmen

are mostly specialties not sold at stores. None of the goods are sold except on orders for future delivery. These salesmen are largely college boys and their work is largely carried on during the summer months.

My client informs me that there has been some difficulty at times, arising through officious village authorities arresting, or threatening to arrest, salesmen for selling goods without a peddler's license, in other cases they are charged with being transient merchants and are subjected to various petty persecutions and annoyances. This condition has resulted in losing the services of good men who do not care to be classed as lawbreakers. It is true that these charges are not sustained but it puts the salesmen to much trouble and expense.

These salesmen are clearly not subject to local ordinances for several reasons, but principally because of the fact that the work is held to be interstate commerce. An opinion from your office to the effect that these salesmen are not subject to local ordinances would serve to prevent much of the petty persecution. It would also serve to satisfy prospective salesmen that the work is not in violation of any law. I submit herewith a brief on the question prepared by the company's attorneys, Gordon & Smith, of Pittsburgh, Pa. If it is possible for your office to issue an opinion on this matter the same would be greatly appreciated. Kindly address the same to The Aluminum Cooking Utensil Company, New Kensington, Pa., and send to my office. Thanking you for any courtesy in this matter, I remain,

Very truly,

R. M. Thompson.

923 Metropolitan Bldg.

LYNDON A. SMITH
ATTORNEY GENERAL

CLIFFORD L. HILTON
ALEXANDER L. JAMES
WILLIAM J. STEVENSON
C. LOUIS WEEKS
ALONZO J. EDGERTON
ASSISTANT ATTORNEYS GENERAL

Office of the Attorney General
St. Paul.

July 14, 1913.

Mr. R. M. Thompson, Esq.,
Attorney at Law,
Minneapolis, Minnesota.

Dear Sir:-

In your letter of the 11th instant you state that the Aluminum Cooking Utensil Company is a Pennsylvania corporation having its principal office in the city of Pittsburg; that it is engaged in the business of selling aluminum cooking utensils to residents of this state in the following manner, to wit:

That it employs persons having samples of the goods manufactured by it, to go from house to house in this state, and take orders for cooking utensils; that such orders are then mailed to the principal office of the company, where such orders are accepted and filled by shipping the utensils ordered, either direct to the purchaser or to the agent who took the orders, who himself then delivers the utensils and receives the pay therefor.

You state that in many instances the persons so taking orders in this state are prosecuted as being peddlers doing business without a license. You ask if under the laws of this state persons so taking orders are required to have a license under the various statutes and ordinances of this state regulating peddling and requiring peddlers to have a license.

In answer to your inquiry I beg to advise you that it is the opinion of this department that persons taking orders and delivering the goods ordered <u>in the manner stated</u>, are engaged in interstate commerce, and that such persons are not subject to the operation of laws of this state, or the ordinances of any city or municipality thereof, which purport to regulate the business of peddling. It is beyond the power of the state or any municipality thereof to impose any such burden upon interstate business.

Very truly yours,

C. Louis Weeks

W-L

Assistant Attorney General.

CHAPTER XXI.

MISSISSIPPI.

State Court Decisions.

Overton vs. Vicksburg, 70 Miss. 558.

Richardson vs. State, 11 So. 934.

CHAPTER XXII.

MISSOURI.

U. S. Supreme Court Decisions.

In re Houston, 47 Fed. 539 (C. C., W. D. Mo.—1891).

Welton vs. State of Missouri, 91 U. S. 275 (1875).

In the town of **JOPLIN** The Aluminum Cooking Utensil Company's salesman, Mr. Charles A. Wylie, was arrested July 19, 1913, for soliciting orders without having paid a license as required by the municipal ordinances.

The line of argument and conclusion is shown in the following extracts from letters of Edgar B. Chestnut.

EDGAR B. CHESTNUT
Attorney at Law
422 Main Street,
JOPLIN, MISSOURI.

RWP-729

July 30, 1913.

THE ALUMINUM COOKING UTENSIL CO.,
East St. Louis, Ill.

re Charles A. Wylie.

Gentlemen:

Your letter of July 29th is before me.

My further investigation of this case has strengthened my original opinion that Mr. Wylie's transactions in Joplin constituted Interstate Commerce and in case of an adverse decision in the Police Court I think that on appeal to the Circuit Court that that Court being

presided over by an able and experienced Judge would render a decision in your favor. I cannot reasonably contemplate a different result because to my mind the law has been made very clear in the opinion of United States Disrtict Judge Van Valkenburgh in the recent case of Jewel Tea Co. vs. Lees Summit reported in 198 Federal Reporter, page 537.

I shall use my best endeavors to get a favorable decision in the Police Court and will await your instructions as to appeal in case a fine should be imposed on Mr. Wylie.

Yours very truly,

EBC–FM EDGAR B. CHESTNUT.

From letter of August 2nd:

"The case of the City of Joplin vs. Chas. A. Wylie was tried today in Police Court. The Police Judge reserved his decision until Monday next. In my opinion the City failed utterly to make out a case against Mr. Wylie and I believe that the Police Judge is of the same opinion."

From letter of August 4th:

"Mr. Wylie has been discharged by the Police Judge and may now go about his work without fear of molestation by the city authorities. The fact that the Commerce Clause of the constitution is a shield against the operation of the City ordinance has been borne in upon the city authorities and the case is closed."

In the town of **HAMILTON,** The Aluminum Cooking Utensil Company's salesman, Mr. Loftus H. Ward, was arrested July 29, 1912, for soliciting orders without having paid a license as required by the municipal ordinances.

The conclusion is reported in the following letter.

WILLIAM McAFEE
Lawyer.
HAMILTON, MO.

HAMILTON, MISSOURI, August 10th, 1912.

Gentlemen:—

In re. LOFTUS H. WARD, Rem-731.

Your dispatch as well as your letter of July 31st, 1912, were duly received. Your Mr. Loftus H. Ward called to see me and in due time

I made an appointment to meet our City Attorney and Mayor, with regard to City License.

This matter has been thoroughly tested in our State, and after considerable squabble with the city officials, I succeeded in convincing them that they had no case against your man Mr. Loftus H. Ward and he has been since following his occupation without hinderance.

I am satisfied that with my efforts before the City Attorney and our Mayor, that there is no danger of any future trouble.

Respectfully,

Wm. McAfee.

HARRY E. RANDEL
Attorney and Counsellor at Law
R. A. Long Building,
Kansas City, Mo.

January Twenty-Third,
Nineteen Fourteen.

Mr. J. H. Randolph,
619 R. A. Long Building,
Kansas City, Mo.

Dear Sir:—

I submit herewith a short brief on the question as to whether or not your salesman, representing the home office at New Kensington, Pa., and taking orders for Aluminum Cooking Utensils, which orders are sent in their original forms out of the state and for goods to be delivered in the future, are required to pay a peddlers' license or transient merchant license, as required by the ordinances of many of the municipalities of this state. As I understand it no sale is made in this state; that the orders are accepted or rejected in another state; and that the goods ordered are located in another state and are shipped from there to fill the orders taken and accepted before.

In the case of State vs. Looney in the 116 Mo. App. page 592, we have an almost identical state of facts: Here an agent of a corporation having its place of business in another state took orders for unframed portraits, to be made at the corporation's place of business, and left with each purchaser a memorandum of the agreement which

recited that a certain price should be paid for the portrait on delivery, and that while the purchaser was not obliged to take a frame, all portraits would be delivered in frames. Subsequently defendant delivered the portraits as agent of the corporation and urged the purchasers to purchase the frames. THE COURT HELD that the transaction as to the portraits constituted inter-state commerce, so that defendant could not be required to take out a peddlers' license but the transaction in regard to the frames did not constitute inter-state commerce.

In the case of Jewell Tea Company vs. Lee's Summit Mo., reported in the 189 Federal at page 280 we find another case in point: Here a merchant in Chicago employed an agent who solicited orders for merchandise in a city in Missouri and reported the orders. The merchant put up each article ordered in a package, and all the packages were shipped to the agent, who took the goods from the depot and delivered them to the customer and collected the price. THE COURT HELD that the agent was not a "peddler" within the ordinance of the city imposing a license for selling goods from wagons; also that the enforcement of a municipal ordinance, void for interference with interstate commerce, by criminal proceedings with frequent arrest and other arrests threatened will be enjoined. The court further said: In my opinion the ordinance is void, because it is in effect a burden on commerce between the states.

In the case of Brennan vs. City of Titusville, reported in 153 United States Reports at page 289, the facts are very similar. In the opinion the Court said: A city ordinance which requires payment of a license tax for soliciting or taking orders for goods, books, paintings, wares or merchandise from persons other than manufacturers or licensed merchants, and which on its face declares the same to be a license for "general revenue purposes," is not, in its application to an agent soliciting for a non-resident manufacturer, a mere police regulation, simply inconveniencing one engaged in interstate commerce but is a direct burden on interstate commerce, and therefore invalid.

Again in the case of Robbins vs. Taxing District of Shelby County, Tenn., we find the facts to be directly in point. In this case the court held that: A state cannot levy a tax or impose any other restriction upon the citizens or inhabitants of other states for selling or seeking to sell their goods in such state before they are introduced therein. Also that: The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce. Such commerce is not

subject to state taxation, even though there be no discrimination between it and domestic commerce.

I feel quite sure that the agents of the Aluminum Cooking Utensil Company when transacting business as you have outlined to me are not to be subject to the payment of "peddlers' license" or on the ground that they are transient merchants, to be compelled to pay any license.

Very truly yours,

HARRY E. RANDEL

The following letter from Hon. Herbert S. Hadley, late Governor of Missouri and a former Attorney General of the same state, explains itself.

LAW OFFICES
HADLEY, COOPER & NEEL
Suite 1215,
Commerce Bldg.,
KANSAS CITY, MO.

HERBERT S. HADLEY,
ARMWELL L. COOPER,
ELLISON A. NEEL,
JOHN S. WRIGHT.

May 9, 1914

MR. GEO. H. BEACH,
Lawrence, Kansas.

Dear Sir:—

I am in receipt of your letter of May 4th in reference to your proposed plan of soliciting orders in this State for sale of aluminum ware manufactured by the Aluminum Cooking Utensil Company of Pittsburgh, Pennsylvania. If the business you conduct in this State is the business of soliciting orders and transmitting the same to the office of the Company at Pittsburgh, Pennsylvania, such transactions would not constitute doing business in this State so as to make it necessary that either you or the Company should take out a license therefor. The Supreme Court and the Supreme Court of the United States have decided that such transactions are interstate commerce and cannot be interfered with or regulated by the laws of the United States.

Very truly yours,

(Signed) H. S. HADLEY.

HSH-AD

CHAPTER XXIII.

NEBRASKA.

State Court Decisions.

Menke vs. State, 97 N. W. 1020.

State of Nebraska.

LEGAL DEPARTMENT

Lincoln. November 19, 1913.

GRANT G MARTIN. ATTORNEY GENERAL
GEORGE W. AYRES, DEPUTY ATTORNEY GENERAL
FRANK E. EDGERTON, ASSISTANT ATTORNEY GENERAL
JOSEPHINE E. MURPHY, STENOGRAPHER

Mr. M. A. Hall,

Omaha, Neb.

Dear Sir:

You have stated to me that you are repreeenting the Aluminum Cooking Utensil Company, of Pittsburgh, Pennsylvania, and have eubmitted to me a statement showing the character of the buainese conducted by said company. You ask me whether this company, and the manner in which it conducts its buainese, should be subjected to the laws of the state of Nebraeka relative to peddler's license, etc.

It appears from your etatement that said company has a manufacturing plant at New Kensington, Penneylvania, at which place it manufactures cooking uteneile, which it sells in the various etates of the Union; that the company employes traveling salesmen, who eolicit in thie state and others, and after securing orders forward them to your company at Pittsburgh, where the ordere are filled and the goods shipped to the salesmen in Nebraska, to be delivered to the respective purchaeers; that no goods are eent to the salesmen except to fill orders actually received; and that the company carriee no stock of gooda in the state of Nebraska and has no delivery storehouse therein.

In the caee of Menke v. State, 70 Neb., 669, our supreme court has passed upon this question and held that traneactions substantially identical with thoee described in your etatement conetitute interstate commerce within the meaning of the federal .oonetitution, and, hence, are not eubject to etate taxation or regulation. Our court haaee its deoieion upon the opinion of the supreme court of the United States in caee of Caldwell v. North Carolina, 187 U. S. 622.

Of course, such transactione ae are not eubject to state taxation or state regulation would not be eubject to village or municipal regulation.

I could not advise you on thie queetion were it not for the fact that our court hae already paseed upon it, ae the advice of this department is limited to etate officers and to county attorneys on certain queetions.

Yours very truly,

Grant G. Martin

Attorney General.

CHAPTER XXIV.

NEVADA.

State Court Decisions.

Ex parte Rosenblatt, 19 Nev. 439.

CHAPTER XXV.

NEW JERSEY.

State Court Decisions.

Kolb vs. Boonton, 64 N. J. L. 163.

CHAPTER XXVI.

NORTH CAROLINA.

U. S. Supreme Court Decisions.

In re Spain, 47 Fed. 208 (C. C., E. D. N. C.—1891).

Caldwell vs. North Carolina, 187 U. S. 622 (1903).

Norfolk & Western Ry. Co. vs. Sims, 191 U. S. 441 (1903).

State Court Decisions.

State vs. Bracco, 103 N. C. 349.

Wrought Iron Range Co. vs. Campen, 135 N. C. 506.

CHAPTER XXVII.

NORTH DAKOTA.

State Court Decisions.

State vs. O'Connor, 5 N. D. 629.

State of North Dakota
OFFICE OF ATTORNEY GENERAL
BISMARCK

ANDREW MILLER,
ATTORNEY GENERAL
ALFRED ZUGER,
C. L. YOUNG,
ASSISTANTS

October 15,
1913.

F. L. McVey, Esq.,
President of University of N. D.,
Grand Forks, N. D.

Dear Sir:

Your letter to the attorney general at hand in regard to University students soliciting orders for aluminum cooking utensils company of Pennsylvania. Under your statement, in my opinion a peddler's license is not required. Of course if one of them is arrested, he would have to employ an attorney to defend him. I do not, however, believe that any state's or city attorney would issue any warrant when the facts were made known to him. If a student soliciting orders is required to procure a license, then every commercial salesman in the state would have to procure license. The students are not peddlers, they are taking orders, and I do not believe there is any law that can interfere with them. I do not believe that the legislature has power to pass any law requiring them to take out license.

Yours truly,

Jos Carmody

Asst. Attorney General.

CHAPTER XXVIII.

OHIO.

In the town of **CANAL DOVER**, The Aluminum Cooking Utensil Company's salesman, Mr. Simon A. Metzer, was arrested for soliciting orders without having paid a license as required by the municipal ordinances.

The conclusion is reported in the following letter.

ED. C. SEIKEL
Attorney at Law

Office in the Vinton Block.

Abstractor of Titles and Notary Public

CANAL DOVER, OHIO, Sept. 13, 1912.

THE ALUMINUM COOKING UTENSIL CO.,
New Kensington, Pa.

Gentlemen:—

In reply to your favor of the 10th inst., pertaining to your Mr. Metzer, I beg to advise that he called at my office sometime after I had mailed my former letter to you and from the facts given to me by him and the Mayor and Chief of Police and from an examination of the Statutes of Ohio and the decisions rendered by the Ohio Courts, I concluded that the Mayor had no authority to impose any fine on Mr. Metzer or to charge him any license fee for delivering merchandise on orders previously taken, and after briefing the Ohio Law and submitting the same to the Mayor and City Solicitor after several conferences with them, they finally agreed that the ordinance was void

and inoperative in so far as it conflicted with The Interstate Commerce Law and refunded to me, for Mr. Metzer, the $10.00 fine paid and $2.00, license fee, making a total of $12.00 and have agreed to permit your Agents to take orders for your products and to send such orders to you and upon receipt of the same to make deliveries without any further molestation..

I have spent considerable time examining and briefing the Ohio Law pertaining to said matter and have concluded to send you a written opinion with references to the Ohio Statutes and decisions, so that you may be able to use the same, if the question again arises anywhere in this State.

Respectfully yours,

Ed. C. Seikel.

ED. C. SEIKEL,
Attorney at Law.

Abstractor of Titles and Notary Public.

Canal Dover, Ohio, Sept. 13, 1912.

The Aluminum Cooking Utensil Co.,
New Kensington, Pa.

Gentlemen:—

In reply to your favor of recent date, pertaining to the right of your Mr. Simon A. Metzer, to take orders in this City for products manufactured by you in the State of Pennsylvania and to send such orders to you to be filled in your state and shipped to him in this City to be delivered to such customers and to collect the proceeds thereof, will say that while this City has an ordinance which was passed years ago, when this City was still a Village and among other things provides, "That all persons who shall on the Street or travel from place to place about said Village to sell, bargain to sell or solicit orders for goods, wares or merchandise by retail shall purchase a license before being allowed***shall pay not more than $15.00 nor less than $2.00 for each day**** Any person or persons found guilty of violating this ordinance shall upon conviction thereof, be fined in any sum not exceeding $10.00, or be confined in the Village Prison from one to ten days, or both at the discretion of the Mayor."

Said ordinance is still in full force and in effect, but the same does not preclude your authorized Agent from taking orders and forwarding the same to you and making deliveries and collections the proceeds, as hereinbefore stated under the statutes and the decisions of the Courts of Ohio and other states and of the United States Courts, for the reasons hereinafter stated, I would suggest however that you place the name of the customer on each package of articles ordered by him in some permanent manner, so that it will be less difficult for the Agent to convince the local authorities, that the articles were shipped by you for delivery after the order was taken and for the further reason that some of the Courts hold that in order to be protected by The Interstate Commerce Law, deliveries must be made in original packages; or all such packages can safely be combined in one or more shipping cases, consigned to your Agent for delivery. As you already have an able opinion from your local attorneys setting forth the decisions of the United States Courts, I will simply refer you to the Ohio Statutes and Ohio Decisions as follows:

Section 3672, General Code of Ohio, after enumerating certain powers granted to municipal corporations in Ohio, has the following provision, "But no municipal corporation may require of the owner of any product of his own raising or the manufacturer of any article manufacturing by him, license to vend or sell in any way, by himself or Agent any such article or product."

Section 3676 of the General Code of Ohio, empowers municipal corporations to license dealers and also provides as follows: "This section shall not apply to persons selling by sample only." Under said sections no municipal corporation could charge your duly authorized Agent to take orders and deliver your products, as hereinbefore stated in the absence of any Interstate Commerce Law, but the Ohio Courts have recognized and applied the Interstate Commerce Law in numerous cases to similar circumstances and the most recently reported case in Ohio is the case entitled: In re Oscar Julius, decided in the May term 1904, of the Circuit Court of the Fifth Circuit of Ohio, composed of Judges Voorhees, Donahue and McCarthy. Judge Donahue is now a member of the Supreme Court of this State, same was heard on the application of Oscar Julius, for a Writ of Habeas Corpus, he having been arrested on a warrant issued by the Mayor of the City of Coshocton, Ohio, based upon an affidavit, charging among other things that he did violate the License Ordinance in said City to-wit:

"By canvassing in the corporate limits of said City for orders for the copying and enlarging of pictures ******* to be done by

the Chicago Crayon Company, a corporation **** located at Chicago, Illinois, of which said Julius was an employee."

To which Affidavit the defendant demurred, which was over-ruled and exceptions taken and the defendant having entered a plea of not guilty and waived in writing, a trial by Jury, was tried and found guilty by the Mayor and was ordered to pay a fine of $5.00 and costs of prosecution taxed at $3.00 and stand committed to City prison, etc.

Thereupon application was made for a Writ of Habeas Corpus and duly issued by one of the Judges of said Court at Chambers, returnable at the first day of its next term when the case was tried on an agreed statement of the facts, in substance the facts charged in the affidavit.

The Court upon reviewing the facts and citing and commenting upon the leading cases, decided by the Federal Courts defining the Interstate Commerce Law and its application concluded as follows:

> "We are disposing of the ordinance as one that interferes with interstate commerce, and for this reason we hold that it is in violation of Section 8, of Article 1, of the Constitution of the United States.
>
> 'The conviction of the petitioner herein is wrong; the affidavit does not charge him with any act in violation of any law of the state or ordinance of the City, that could be enforced against him. The writ is allowed. The petitioner is dismissed from custody at the costs of the State. Petitioner discharged.' "

Said proceeding was not carried to the Supreme Court of this State and consequently is considered as final until modified by a decision of the Supreme Court of this State.

In case of Arnold vs. Yanders, found in Volume 56, at page 417 of the Ohio Supreme Court Reports, the Court defined what constitutes interstate commerce and declared a statute void which required a non-resident of the State to pay a license to sell convict-made goods, as being in conflict with section 8, or Article 1, of the Constitution of the United States.

The first Circuit Court of Ohio, in case of August Brunner vs. Harrison Village, reported in Vol. 15, Circuit Decisions, at page 247, held a similar ordinance invalid, as being in restraint of trade, to-wit:

> "A municipal ordinance making it unlawful for any person while on the street or traveling from place to place about the village, to sell or solicit orders for goods and merchandise, without first procuring a license, is an intolerable interference with and in restraint of trade, and invalid."

The Court of Common Pleas in case of Burkhard vs. Columbus, reported in 17th Law Bulletin, at page 342, held that such ordinance in so far as it is applicable to goods made outside of the State, is void and a dealer compelled to pay a license fee, may recover back the same if paid under protest.

The Circuit Court of Ohio in case of Toledo vs. Buechele, reported in 19th Ohio Circuit Report, at page 127, defined the rule under which money illegally collected could be recovered, which decision was affirmed by the Supreme Court of Ohio without report and entered in 65th O. S. page 603.

The same question was considered and decided by the Supreme Court of Ohio, in case of Mays against Cincinnati, reported in first Ohio State, page 268 and Stephan vs. Daniels, reported in 27th O. S., page 527.

You will note from said statutes and said decisions, that no municipal corporation in Ohio, has power to pass or enforce any ordinance requiring any person to pay a license, whether a resident or non-resident of Ohio, to take orders for merchandise manufactured within or without the State and all such ordinances are absolutely void and unenforcable.

Trusting that the above mentioned Statutes and Decisions may be the means of avoiding payment of license fees by your Agents in other municipalities in this State, as effectively as in this City, and I remain,

Respectfully yours,

Ed. C. Seikel.

CHAPTER XXIX.

OKLAHOMA.

State Court Decisions.

Baxter vs. Thomas, 4 Okla. 605.

BEBOUT & VOYLES,
Attorneys Counsellors at Law,
VINITA, OKLA.

February 26, 1912.

THE ALUMINUM COOKING UTENSIL CO.,
East St. Louis, Ill.

Gentlemen:

We have the pleasure in reporting to you that in the case of the City of Vinita vs. Geo. A. Nunn, in which the defendant Nunn was charged with doing business as a peddler contrary to an ordinance requiring peddlers and itinerant venders to pay a license, we secured an acquittal.

We take the liberty of handing you herewith the benefit of our investigation in this case with the thought that it may be of value to your agents at other points.

It is a well established rule of law that a person selling goods or soliciting orders for the same, the goods being without the state at the time the sale is made or the orders taken, cannot be subjected to a license tax for making such sale or taking the orders. His business is Interstate Commerce and not domestic and is not subject to municipal or state regulation. The Negotiation of sales of goods which are in another state for the purpose of introducing them into the state in which the negotiation is made is Interstate Commerce.

120 U. S. 489; 156 U. S. 296; 187 U. S. 694.

A state law is unconstitutional and void which requires a person to take out a license to carry on Interstate Commerce.

117 U. S. 34; 120 U. S. 489; 127 U. S. 640;
128 U. S. 129; 129 U. S. 141; 136 U. S. 104;
136 U. S. 114; 141 U. S. 47; 135 U. S. 161;
94 U. S. 238; 164 U. S. 650.

A state can not levy a tax or impose any restriction upon the sale or the offer to sell goods in such state before they are introduced therein:

120 U. S. 489; 136 U. S. 104.

A tax upon the sale of goods or the offer to sell them before they are brought into the state is a tax on Interstate Commerce and void:

120 U. S. 489; 191 U. S. 441; 121 U. S. 230;
129 U. S. 141; 145 U. S. 1; 135 U. S. 161;
153 U. S. 289; 125 U. S. 465; 181 U. S. 283;
185 U. S. 27; 122 U. S. 326; 127 U. S. 640;
128 U. S. 129; 136 U. S. 104; 91 U. S. 275;
116 U. S. 446; 203 U. S. 507; 129 U. S. 141;
187 U. S. 622.

Interstate Commerce can not be taxed at all even though the same amount of tax should be laid on domestic commerce or that which is carried on solely within the state.

15 Wallace 232; 120 U. S. 489.

The cases distinguish between cases wherein the goods are manufactured without the state, shipped into the state and then sold and cases wherein the goods are manufactured without the state, sold or orders taken for sale, while the goods are yet without the state, and then shipped into the state and delivered. In the latter class of cases, the goods are Interstate and not subject to state or municipal regulation.

The cases we cite will enable any of your agents to successfully resist the payment of license.

Very truly yours,
BEBOUT & VOYLES,
(Signed) W. K. VOYLES.

CHAPTER XXX.

OREGON.

In this State the defense of interstate commerce cannot be used as the Company maintains a warehouse and shipping depot at Portland, in Multnomah County, from which shipments to all points within the State are made. However, municipal ordinances in this State requiring the payment of a license fee by canvassing salesmen are invalid in many particulars, as set out in the following brief:

WILBUR & SPENCER & F. C. HOWELL,
Attorneys at Law.

PORTLAND, OREGON, March 10, 1914.

VALIDITY OF MUNICIPAL ORDINANCES IN OREGON REQUIRING LICENSES OF CANVASSERS WHO TAKE ORDERS FOR FUTURE DELIVERY.

Municipal ordinances purporting to require a license fee from canvassers, who take orders for the future delivery of goods, may be invalid in one or more particulars. Consequently, whenever such a canvasser is threatened with arrest for failure to take out a license, the ordinance which imposes the license should be carefully examined with respect to the following points:

I. Is the ordinance authorized by the municipal charter?

II. Is the ordinance directed against "hawkers and peddlers" only?

III. Is the ordinance directed against venders of a special class of goods?

IV. Does the ordinance itself give a special definition to the term "peddler?"

V. Does the ordinance discriminate against certain individuals?

VI. Does the ordinance impose a reasonable fee?

1. When a license for regulation only is authorized.

2. When a license for revenue in addition to regulation is authorized.

1. IS THE ORDINANCE AUTHORIZED BY THE MUNICIPAL CHARTER?

"The city has no *inherent* power to license any occupation, calling or profession, or to exact a fee from any one engaged therein, but such power must emanate from legislative authority plainly and unmistakably delegated; that is to say *it must be found in the charter*, either in express terms or by necessary implication from the nature of the grant."

Justice Wolverton in *Lent vs. Portland*, 42 Ore. 488.

When *Lent vs. Portland*, supra, was decided the constitution of the State of Oregon permitted the granting of a municipal charter by special act of the legislature; but by a vote of the people on June 4th, 1906 and November 8th, 1912, the constitution was amended as follows: "Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The legislative assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the constitutional and criminal laws of the State of Oregon." Laws of 1911, Page 10, amending Article II, Section 2 of the State Constitution.

It will thus be seen that this amendment deprives the legislative assembly of all authority to enact, amend or repeal any charter of a city or town by special laws.

Municipal charters now in force in Oregon may have been obtained in one of three ways. (a) By special act of the legislature prior to June 4th, 1906. (b) Under the general incorporation act of 1893; (Chapter I of Title XXVI, L. O. L., as amended February 28, 1913, Laws of 1913, Page 689). (c) By vote of the people, as provided by the amendment to the State Constitution, Laws of 1911, Page 10.

A municipal charter obtained as above may have since been amended by the legal voters of the municipality. To determine just what powers the council possesses, it is necessary to examine every part of the charter itself, and not rely upon the wording of the general incorporation act, or any acts of the legislature relating to the particular municipality.

The power to license or tax "must be found in the charter" either in express words or by necessary or unmistakable implication.

After the exact scope of the charter has been ascertained in this way, it should next be determined whether the objectionable ordinance falls exactly within the power conferred upon the council by the charter. Take for example a charter obtained under the general incorporation act of 1893, which provides that the mayor and council shall have the power to "license, regulate and control any lawful business."

It is apparent, of course, that an ordinance purporting to have been passed in pursuance of this authority, and in itself stating it was passed to "license, regulate, prohibit and suppress canvassing" would be invalid for the reason that the charter conferred no authority upon the council to "prohibit and suppress" canvassing.

Dillon Mun. Cor. 5th Ed. 661-667.

II. IS THE ORDINANCE DIRECTED AGAINST "HAWKERS AND PEDDLERS" ONLY?

"At common law and under the statutes which have been sustained concerning peddlers, they are such as travel from place to place, selling the goods carried about with them.....not such as take orders for the delivery of goods to be shipped in the course of commerce."

Crenshaw vs. Arkansas, 227 U. S. 389.

"It has never been understood either by the profession or the people that one who is ordinarily styled a "drummer," that is one who sells to retail dealers or others by sample, is either a hawker or a peddler; and the same is true in respect to persons who canvass, taking orders for the future delivery of books or other objects. It is a fundamental canon of construction that the legislature must be presumed to have used these words in their known and accepted signification, and intended thereby to confer upon the city and village authorities power to license, regulate and prohibit only such callings and occupations as might fall within the terms employed in the act as thus known and understood."

Emmons vs. Lewistown, 132 Ill., 380; 8 L. R. A. 328; 22 Am. St Rep. 540.

The decisions almost unanimously support the principle stated in the two quotations above, that a canvasser who takes orders for future delivery and does not deliver as he sells is not a "peddler." Of the many cases which support this doctrine, the following may be cited:

State vs. Lee, 113 N. C. 681; 18 S. E. 713; 37 Am. St. Rep. 649.

State vs. Morehead, 42 S. C. 211; 20 S. E. 544; 46 Am. St. Rep. 719; 26 L. R. A. 585.

Commonwealth vs. Farnum, 114 Mass. 267.

Kennedy vs. People, 9 Colo. App. 490; 49 Pac. 373.

The State law of 1909 with regard to "peddlers" (L. O. L. 4961), states specifically that for the purposes of that act, any one, whether acting for himself or another, who takes orders for delivery in the future by samples or catalogue, shall be considered a "peddler," the same as one who travels from place to place and sells goods outright. It cannot be contended that the special definition, which this act gives the term "peddler," should be given that term whenever it is employed in a municipal ordinance. Not only would such an application be repugnant to the ordinary rules of construction, but the act itself states that it shall not apply to cities and towns, which by their charter are authorized to license "peddlers," or "hawkers," or "itinerant venders."

Spaulding vs. McNary, 64 Ore. 491, holds that the act of 1909, relative to venders is unconstitutional in so far as it relates to agents soliciting orders to be filled by shipping goods from another State, but does not touch the question of the enlarged meaning of the term peddler.

Therefore municipal ordinances which relate to "peddlers" or "hawkers" only, and require a license fee as a condition precedent to conducting their business, do not apply to an agent or salesman, who takes orders by sample or catalogue and who will deliver only such goods, as are previously ordered. Such persons are not "peddlers" or "hawkers," where the ordinary meaning of the word is not legally defined or enlarged.

The statute authorizing towns "to license, tax, regulate, suppress and prohibit peddlers, empowers them to exact a license as peddlers from such person only as can be termed such in signification of the word as there used; and hence an ordinance which attempts to enlarge such a signification is to that extent void."

Kennedy vs. People, 49 Pac. 373.

III. IS THE ORDINANCE DIRECTED AGAINST CERTAIN CLASSES OF GOODS?

Municipal corporations are the creatures of statute or the people and can exercise only such powers as are expressly conferred upon them or as exist by necessary implication. The ordinances of a municipality can not go beyond the limits of its charter.

In *Standard Oil Co. vs. Swansom*, 49 S. E.(Ga.) 262, it was held that a statute imposing a special tax upon traveling venders "of patent or proprietary medicines, special nostrums, jewelry, paper, soap, or other merchandise" did not embrace venders of oil. The Court construed "or other merchandise" to mean ejusdem generis with and not of a quality superior to or different from those specially enumerated.

It is also held that tea and coffee are not provisions within the meaning of a statute prohibiting peddling without a license, but excepting the sale of provisions from the operation of the act.

Commonwealth vs. Caldwell, 76 N. E. (Mass.) 955.

IV. DOES THE ORDINANCE ITSELF GIVE A SPECIAL DEFINITION TO THE TERM "PEDDLER"?

Municipalities sometimes attempt in license ordinances to give the term "peddler" a special definition. An ordinance of the City of Corvallis, Oregon, for example, defines the word as it is defined in the State Peddler Law (L. O. L. 4961), thus including canvassers who take orders for delivery in the future. In the absence, however, of an act of the legislature authorizing municipalities to place arbitrary definitions upon the term "peddler," they must give the word its ordinary meaning in their ordinances.

Davenport vs. Rice, 75 Ia. 74; 9 Am. St. Rep. 454.

In this case the agent of a local merchant was arrested for soliciting orders without first taking out the license required by an ordinance which defined the term "peddler" in a special way. The Court held that this special definition was not valid, and said, "The soliciting of orders for goods by sample was in no sense peddling * * * * * * The City Council has no power under the City charter to enact by ordinance 'that soliciting orders for future delivery of goods shall be deemed and taken to be peddling under the meaning thereof'."

Even where the municipality apparently has authority to specify who shall and who shall not be regarded as peddlers, arbitrary and unusual definitions will not be tolerated.

City of St. Paul vs. Briggs, 85 Minn. 290; 88 N. W. 984; 89 Am. St. Rep. 554.

This is an instructive case. Under the charter of the City of St. Paul, the council was authorized to "*define, restrain, and license hawkers, peddlers, etc.*" A salesman who sold goods to retailers was arrested for refusing to take out a license required by an ordinance passed apparently in pursuance of the authority conferred by the

charter in the words above quoted. Although the charter in this case specifically authorized the council to "define" hawkers and peddlers, the Court held: "The power to define the offense must be confined within reasonable bounds and limited to the generally accepted meaning of the law relating to that subject**********The exercise by municipal corporations of the delegated power to enact ordinances must be confined within the general principles of the law applicable to the subject of such ordinances."

It follows, therefore, that salesmen who take orders for future delivery only are not obliged to take out licenses under ordinances which attempt to say that a "canvasser" is a "peddler," unless the charter itself clearly enlarges the meaning of the word.

V. DOES THE ORDINANCE DISCRIMINATE AGAINST CERTAIN INDIVIDUALS?

Municipal ordinances regarding canvassers and peddlers frequently specify that their provisions shall not apply to agents of local merchants, or to persons selling their own products by canvassing or peddling. Such ordinances, according to the prepondering weight of opinion in this and other States, can not be enforced.

State vs. Wright, 53 Ore. 344.

Ex Parte Frank, 52 Cal. 606; 28 Am. Rep. 642.

City of Peoria vs. Gugenheim, 61 Ill. App. 374.

Brooks vs. Mangan, 86 Mich. 576; 24 Am. St. Rep. 137; 49 N. W. 633.

In *State vs. Wright*, supra, an act (Laws of 1905, Page 339), provides that any peddler, hawker or itinerant vender who shall peddle, hawk or vend any stoves, ranges, wagons, carriages, buggies, carts, surreys or other kinds of four wheeled or two wheeled conveyances or fanning mills or similar classed wares or merchandise within such county without first having obtained a license therefor was held to be invalid, as being arbitrary and class limitation. Mr. Justice Bean in rendering the opinion of the Court says, "It is true a State may impose a tax, or require a license from persons engaged in certain classes of trades, but the classification must be on some reasonable basis, and the law when enacted must apply alike to all engaged in the business or occupation **********So, also, a law requiring a peddler's license has been held to be void if it exempts certain favored individuals by reason of their residence, or the goods sold by them."

In support of the above statements the Court cites the following:

Chaddock vs. Day, 75 Mich. 527; 42 N. W. 977; 4 L. R. A. 809, which held invalid an ordinance requiring a license of $10.00 per month from all persons selling meat on the streets in smaller pieces than a quarter of the animal.

Commonwealth vs. Snyder, 182 Pa. 630; 38 Atl. 356, which held invalid an ordinance requiring a license for peddling in Perry County, Pennsylvania, but exempting peddlers dealing exclusively with merchants in that county, merchants having a local place of business therein and citizens of the county selling product of their own growth and manufacture.

Sayre Borough vs. Phillips, 148 Pa. 482; 24 Atl. 76; 16 L. R. A. 49, which held invalid an ordinance requiring a license for peddling, but exempting all residents of the borough.

State vs. Wagener, 69 Minn. 206, 72 N. W. 67, 38 L. R. A. 677, which held invalid an ordinance requiring a license of peddlers, but exempting manufacturers, farmers, etc., selling their own products.

Ordinances which discriminate against non-residents of a municipality, as well as those which discriminate against non-residents of a State, have been held invalid.

People vs. Jarvis, 46 N. Y., Supp. 596, 600.

City of Saginaw vs. Circuit Judge, 106 Mich. 32.

Braceville vs. Doherty, 30 Ill., App. 645-61.

Lucas vs. City of McComb, 49 Ill., App. 60.

Morgan vs. City of Orange, 50 N. J. L. 389; 13 Atl. 240.

Muhlenbrink vs. Commissioners, 42 N. J. L. 364.

Ex Parte Thornton, 12 Fed. 538.

Mayor, etc. vs. Chasan, 79 Atl. 1058.

Town of Pacific Junc. vs. Dyar, 19 N. W. 862.

State vs. Williams, 73 S. E. 1000.

Brooks vs. Mangan, 49 N. W. 633.

VI. DOES THE ORDINANCE IMPOSE A REASONABLE FEE?

The Courts hold there is a difference between the power to "license and regulate" and the power to license for revenue; that in the exercise of the power to license for revenue, a municipality may impose a higher fee than when exercising merely the power to "license and regulate;" but that in no case may an ordinance provide a prohibitive fee with respect to useful and harmless occupations. Each of these propositions should be considered more in detail.

1. Authority to "license and regulate" useful and harmless occupations does not confer authority to license for revenue.

"When a municipal corporation is given the power to license useful trades and occupations, it cannot use the license as a tax to raise revenue, nor is it authorized to prohibit entirely the exercise of the trade or occupation by an excessive license fee."

13 Am. and Eng. Enc. Law, 1st Ed., Page 532.

"The taxing power is to be distinguished from the police power, the general nature of which has been before adverted to. The power to license and regulate particular branches of business or specified matters is usually a police power; but when license fees or exactions are plainly imposed for the sole or main purpose of revenue, they are, in effect, taxes. The authority to license and regulate various enumerated matters is very generally conferred upon the municipal councils, and there is, as we have seen in the former chapter, some difference of judicial opinion as to the extent of power thus conferred, particularly in reference to using it for purposes of revenue. Ordinarily, the mere power to license or to subject to police regulations, does not give the power to tax distinctly for revenue purposes; but it may give the power when such appears from the nature of the subject-matter, and upon the whole charter or enactment, to have been the legislative intent, but not otherwise."

Dillon Mun. Cor. 5th Ed., Section 1408.

"The objects attained by the exercise of the powers of taxation and of license not being one and the same thing, the power delegated to a municipality to tax will not confer authority to license. But it is the generally received doctrine that the power granted to a municipality to regulate or to prohibit, includes the power to license as a means to those ends."

25 Cyc., Page 602 (2).

"Concerning *useful trades and occupations*, a distinction is to be observed between the power to "license" and the power to "tax." In such cases the former right, unless such appears to have been the legislative intent, does not give the authority to prohibit, or to use the license as a mode of taxation with a view to revenue, but a reasonable fee for the license and the labor attending its issue may be charged."

1 Dillon Mun. Cor. 5th Ed., Section 661, Page 996.

"As all delegated powers to tax are to be closely scanned and strictly construed, it would seem that when a power to license is given, the intendent must be that regulation is the object, unless there is something in the language of the grant, or in the circumstances under which it is made, indicating with sufficient certainty that the raising of revenue by means thereof was contemplated."

Cooley, Taxation, 3rd Ed., Page 1139.

"A power to license should be used only for regulation, unless there is something in the language of the grant, or the circumstances of the case clearly indicating that it was also intended to be used for the purpose of revenue**********While the power to license may be inferred from the power to regulate, the power to tax cannot."

In Re: Wan Yin, 22 Fed. 701. (The laundry license case.)

"In the statute before us the language used is "to regulate" and "to license." As we have seen, these words of themselves do not confer the right to tax or prohibit, and, no other words being used, the intendment is that regulation, merely, was the object."

People vs. Jarvis, 46 N. Y., Sup. 596, 599.

It was held in *State vs. Bean*, 91 N. C. 554, that a power to license the carrying on of trades, etc., is a police power and does not confer power to use the license as a mode of raising revenue. To the same effect are the following cases:

Vansant vs. Harlem Stage Co., 59 Md. 330.

The Mayor, etc., vs. The Second Ave. R. R. Co., 32 N. Y., 261.

The State vs. The Mayor, etc., of Hoboken, 33 N. J. L. 280.

Muhlenbrink vs. Commissioners, 42 N. J. L. 464.

Clark vs. New Brunswick, 43 N. J. L. 175.

City of Saginaw vs. Circuit Judge, 106 Mich. 32.

City of St. Louis vs. Boatmans Ins. & Trust Co., 47 Mo. 150.

There is one Oregon case, *Abraham vs. City of Roseburg*, 55 Ore. 359, which may seem at first glance to be at variance with the principles and decisions cited above. This case involved the validity of an ordinance requiring attorneys to pay a license fee of $10.00 per year. The ordinance was passed in pursuance of the power conferred by the charter, to "license and regulate all such callings, trades and occupations, which the public good may require to be licensed, and regulated, as are not prohibited by law." After referring to the decisions which support the view that a tax cannot be levied under a power to "license" and "regulate" the Court said: "Other courts and perhaps the most recent decisions hold that under a power to 'license and regulate' employments, the license may be used as a means of raising revenue." And cited the following cases in support thereof:

(*a*) *Ex Parte*, 52 Calif. 606; 28 Am. Rep. 642. This case involved the construction of a section of the charter containing the same words as were under consideration in the Roseburg case, "as the public good may require to be licensed," and the Court held that these words supplementing the power to license and regulate, conferred the power to license for revenue.

(*b*) *City of San Jose vs. San Jose and Santa Clara Railroad Co.*, 53 Calif. 475. In this case the Court construed the section of a charter which authorized the municipality "to fix the rates of license tax in addition to the power to 'license and regulate'." The Court rested its decision on the word "tax," as indicating that a tax on the occupation was authorized, and not merely the power to regulate the business.

(*c*) *State vs. Citizens Bank of Louisiana*, 52 La. Ann. 1086; 27 S. 709, but this case has no bearing whatever on the question, for it does not dicuss at all the right of a municipality to raise revenue under a power to license and regulate.

(*d*) *Fleetwood vs. Read*, 21 Was. 547; 58 Pac. 665; 47 L. R. A. 205. In this case the Court construed a statute which authorized certain cities to "grant licenses for any lawful purpose." It was held that the words, "for any lawful purpose," supplementing the power to license, conferred the power to license for revenue.

(*e*) *Kingsley vs. Chicago*, 124 Ill. 359; 16 N. E. 260. This case is squarely in accord with the above quotation for the decision in *Abraham vs. City of Roseburg*, but of all the cases cited, it is the only one which does support that statement.

It is hardly to be supposed that our Supreme Court intended in this case to run counter to the whole current of authority, and meant to say that the words "license and regulate," without qualification, confer authority to license for revenue. What the Court did in this case was to hold that the words, "As the public good may require to be licensed," as the qualifying phrase which conferred the authority to raise the tax. The Court said "The term public good is sufficiently broad enough to include the raising of revenue, if in the judgment of the council revenue is needed."

2. *The license fee, under a bare power to license and regulate, is in the case of useful and harmless occupations, such an amount only as will compensate for issuing the license, and supervising the business which is licensed.*

"Where the grant is not made for revenue, but for regulation merely, a much narrower construction is to be applied. A fee for the license may still be exacted, but it must be such a fee only as will legitimately assist in the regulation and it should not exceed the necessary or probable expense of issuing the license and of inspecting and regulating the business which it covers. If the State intends to give broader authority, it is a reasonable inference that it will do so in unequivocal terms."

Cooley, Taxation, 3rd Ed., Page 1141.

"It is well settled that the amount of an occupation tax imposed in the exercise of the police power may include not only the cost of issuing a license, but also a reasonable compensation for the expense of supervising their licensed occupation, but whenever it is manifest that the amount of such tax imposed in the exercise of the police power is substantially in excess of a reasonable fee for issuing the license and of regulating the occupation to which it pertains or is virtually prohibitory, the act or ordinance imposing the tax is invalid."

25 Cyc. 611.

"A fee may be required for a license issued merely as a means of regulation, but the amount must not be more than is necessary to cover the cost of issuing the license and the incidental expenses attending the regulation of the business."

In Re Wan Yin, 22 Fed. Rep. 701.

"While the State may regulate all legitimate occupations, trades, etc., it cannot, under any pretended exercise of its police power, prohibit persons from pursuing such callings."

State vs. Hume, 52 Ore. 1.

"A license fee is such a sum as will compensate for the expense of issuing and recording the license, and, when the license is issued for the purpose of securing police control over the matter licensed, such further sum will probably be incurred in inspecting and regulating such business."

People vs. Jarvis, 46 N. Y., Sup. 596.

"The municipality, under the authority given it to license, had the right to impose such a charge as would cover, not only the necessary expenses of issuing it, but also the additional labor of officers, and other expenses imposed by the business, but nothing beyond this."

City of Ottumwa vs. Zekind, 95 Ia. 622.

To the same effect is:

Ash vs. People, 11 Mich. 347.

State vs. Finch, 80 N. W. 856.

City vs. Jacobs, 73 S. W. 1097.

Inc. Town of Stamps vs. Burke, 104 S. W. 153.

John Rapp vs. City of Kiel, 115 Pac. 651.

Seattle vs. Deckner, 108 Pac. 1086.

Gainer vs. Roll, 75 Atl. 179.

3. *Even under a power to tax, the municipality may not impose a license fee that is prohibitory or unduly burdensome on a useful and harmless occupation.*

"A tax is laid for the double purpose of regulation and revenue must be grounded in both the police and taxing power; but the grant of a power to tax *would not authorize the imposition of a burden in its nature and purpose prohibitory.*

Cooley, Taxation, Page 11.

"If a revenue authority is conferred upon the municipality, the extent of the tax, when not limited by the grant itself, must be understood to be left to the judgment and discretion of the municipal government, to be determined in the usual mode in which its legislative authority is exercised; but the grant of authority to impose fees for the purpose of revenue *would not warrant their being made so heavy as to be prohibitory*, thereby defeating their purpose."

Cooley, Taxation, 3rd Ed., Page 1140.

"But the State could not, under such circumstances, impose a license tax beyond the necessities of the city, *nor one so excessive as to prohibit or destroy the occupation or business upon which it is imposed.*"

Ogden vs. Crossman, 17 Utah 66, 53 Pac. 985.

It was held in *Hirschfield vs. Dallas*, 29 Tex. App. 242; 15 S. W. 124, that an ordinance requiring a license tax of $500.00 per year from ticket scalpers was invalid, because "the tax amounted to an absolute prohibition of a business, the pursuit of which it was beyond the power of the corporation to prohibit, the occupation not being *per se* injurious to the public."

To the same effect are,

Morton vs. Mayor, 111 Ga. 162; 36 S. E. 627, 50 L. R. A. 485.

Hagar vs. Walker, 128 Ky. 1; 15 L. R. A. (N. S.) 195.

City of Lyons vs. Cooper, 39 Kan. 324; 18 Pac. 296.

Caldwell vs. Lincoln, 19 Nebr. 569; 27 N. W. 647.

Brooks vs. Mangan, 49 N. W. 633.

Chaddock vs. Day, 42 N. W. 977.

Sipe, vs. Murphy, 31 N. E. 884.

People vs. Wilson, 94 N. E. 141.

People vs. Jenkins, 94 N. E. 1065.

Iowa vs. Glassman, 136 N. W. 899.

City of Louisville vs. Pooley, 124 S. W. 315.

Ex Parte Eaglesfield, 180 Fed. 558.

The following statement appears in 25 Cyc. 612: "The act imposing the license tax is regarded as discretionary and not subject to review if it is enacted in the exercise of taxing power or in the exercise of the power to prohibit."

The apparent contradiction between the above and the authorities quoted is explained by the writer's failure to distinguish between occupations which are harmful *per se* and those of a different character. Practically all the cases he cites in support of his statement involve ordinances which relate to the liquor traffic, and so far as the statement refers to business of that nature, it is correct. It is incorrect, however with respect to occupations of a useful or harmless nature, as is evidenced by two cases of a different character, which he seems to have cited unwittingly, (*Hirschfield vs. Dallas*, and *Ogden vs. Crossman*, quoted above), for these cases flatly contradict the doctrines stated in the text.

Even when the charter contains an express power to prohibit, a prohibitive license tax cannot be imposed on useful and harmless occupations. Such power is subject to limitation, and can be literally exercised only in respect to those callings more or less opposed to the public good, liquor selling, gaming devices, etc.

Sipe vs. Murphy, 49 Ohio St. 536; 31 N. E. 884.

City of Carrolton vs. Bazette, 159 Ill. 284–42, N. E. 837; 31 L. R. A. 522.

It follows from the above that before we can determine whether or not the fee imposed by any particular license ordinance is unreasonable, we must first ascertain from the charter whether the municipality is authorized merely to license and regulate, or whether a power to tax is conferred expressly or by necessary implication. When considering this question, all parts of the charter must be carefully examined, for the taxing power apparently withheld in what seems the proper section for it, may be conferred in another section.

If power to license and regulate only is conferred, the particular ordinances should be tested by the principles stated in 2 above. What is a reasonable fee under these principles varies with the circumstances of each case. In the famous laundry case above cited, in Re. Wan Yin, Judge Deady held that a fee of $5.00 per quarter for laundries in the City of Portland, was too high, and expressed the opinion that $1.00 per quarter would be ample. In *State vs. Bean*, 91 N. C. 554, a fee of $3.00 per month from butchers was declared too high.

If power to license for revenue is conferred, a larger fee may be imposed; but it must be reasonable, fair and not in restraint of trade.

Dillon—Mun. Cor. 5th Ed., Sections 592–594.

The principles stated in 3 above apply in this instance and the ordinance can be nullified if it practically prohibits a useful or harmless occupation. In the case of salesmen taking orders for future delivery any ordinance imposing a fee of more than $1.00 per week doubtless would be declared invalid by the courts. If in a case of this kind the jury finds the amount of the license fee unreasonable, neither the Court nor the jury can fix a smaller fee, which might be regarded as reasonable, for the ordinance imposing the fee is void.

Postal Telegraph & Cable Co. vs. New Hope, 192 U. S. 65.

The distinction between occupations which are harmful *per se* and those of a useful or at least harmless character must be kept constantly in mind. If this distinction is overlooked, the cases cited by opposing counsel in line with the above quotation from 25 Cyc. 612 will assume an importance which they do not possess. The authorities are uniform in holding that municipalities may impose a prohibitive fee on occupations of that character, either under a power to prohibit or under a mere power to tax. It is different with respect to occupations of a useful or harmless character, and it is doubtful whether there is a single text writer, or a single strong decision that can be cited in support of the contention that a prohibitive license tax can be imposed on such occupations.

There is a distinction also between the right of a municipality to impose a high license tax on occupations of a useful or harmless character and its right to impose such a tax on persons engaged in furnishing amusements, exhibitions, etc. "Respecting amusements, exhibits, etc., the authority of the corporation under the power to license has been regarded as greater than when the same word is applied to trades and occupations." First Dillon Mun. Cor. 5th Ed., Section 661. Consequently we must be on our guard against citations from cases relating to amusements and exhibitions.

Respectfully submitted,
WILBUR & SPENCER & F. C. HOWELL,
Attorneys.

CHAPTER XXXI.

PENNSYLVANIA.

In this State the defense of interstate commerce cannot be used as the Company maintains a warehouse and shipping depot at New Kensington, in Westmoreland County, from which shipments to all points within the State are made. However, municipal ordinances in this State requiring the payment of a license fee by canvassing salesmen are invalid in many particulars, as set out in the following brief.

BRIEF OF AUTHORITIES EXEMPTING SALESMEN OF THE ALUMINUM COOKING UTENSIL COMPANY FROM PAYMENT OF LICENSE TAXES IMPOSED BY BOROUGHS AND MUNCIPALITIES OF THE STATE OF PENNSYLVANIA.

Submitted April 28, 1913,
by
GORDON & SMITH,
Frick Building Annex, PITTSBURGH, PA.,
General Counsel for
THE ALUMINUM COOKING UTENSIL CO.

The attempt to impose license taxes on the Company's salesmen in this State may be made under a number of Acts of Assembly, among which may be mentioned:

Act of April 22, 1846, p 11, P. L. 489.

Act of April 3, 1851, p 2, Clause XI, P. L. 320.

Act of February 27, 1868, p 1, P. L. 43.

Act of March 17, 1883, P. L. 31.

Act of May 24, 1887, P. L. 185.

Act of May 2, 1899, P. L. 159.

Act of March 7, 1901, Article 19, p 3, Clause IV; P. L. 40.

Act of May 16, 1901, p 6, P. L. 228.

The acts which will probably cause the greatest difficulty are those which empower cities and boroughs to impose license taxes in certain instances. The first inquiries to be made in such a case are obviously (1) whether the ordinance under which the tax is imposed, on its proper construction, covers the employees of this Company; and if so, (2) whether as so construed the ordinance comes within the grant of power made by the legislature to the municipality. There is no doubt that a tax may lawfully be imposed on the Company's salesmen by a municipal ordinance satisfying these conditions. On this proposition the following cases may be of interest:

Warren vs. Geer, 117 Pa. 207 (1887).

Millerstown vs. Bell, 123 Pa. 151 (1889).

Titusville vs. Brennan, 143 Pa. 642 (1891).

Commonwealth vs. Harmel, 166 Pa. 89 (1895).

North Wales Borough vs. Brownback, 10 Pa. Superior Ct. 227 (1899).

Affirmed in *Brownback vs. North Wales Borough*, 194 Pa., 609 (1900).

New Castle vs. Cutler, 15 Pa. Superior Ct. 612 (1901).

Mechanicsburg Borough vs. Koons, 18 Pa. Superior Ct., 131 (1901).

Kittanning Borough vs. Natural Gas Co., 26 Pa. Superior Ct. 355 (1904).

Edgewood Borough vs. Scott, 29 Pa. Superior Ct. 156 (1905).

Titusville vs. Gahan, 34 Pa. Superior Ct. 613 (1907).

Mahoney City Boro. vs. Hersker, 40 Pa. Superior Ct. 50 (1909).

But though an ordinance may appear to come within the legislative grant of power, it may not in reality do so and may be invalid. Thus, an ordinance cannot be enforced if it makes an unjust discrimination, e. g., one in favor of residents of the municipality.

Sayre Boro. vs. Phillips, 148 Pa. 482 (1892).

Shamokin Boro. vs. Flannigan, 156 Pa. 43 (1893).

Where the passing of the ordinance is not *directed* by the legislature, but is merely allowed (which is the case with most of these ordinances),

the ordinance is invalid unless it is reasonable. This principle is recognized in many of the cases already cited, and had been applied to ordinances of all kinds by other Pennsylvania cases.

Commissioners vs. Gas Co., 12 Pa. 318 (1849).
Fisher vs. Harrisburg, 2 Grant (Pa.) 290 (1854).
O'Maley vs. Boro. of Freeport, 96 Pa. 24 (1880).
Kneedler vs. Boro. of Norristown, 100 Pa. 368 (1882).
Scranton City vs. Straff, 28 Pa. Superior Ct. 258 (1905).
Ligonier Valley R. R. Co. vs. Latrobe Boro., 216 Pa. 221 (1907).
See also
Dillon on Municipal Corporation, 5th Ed., Vol. 2, Pages 589-602 and notes.

From an examination of the cases, however, it is believed that the courts will not hold an ordinance imposing a license tax in accordance with the literal meaning of an Act of Assembly invalid merely on the ground of unreasonableness except in an extreme case.

What might not be justified as a tax for revenue has sometimes been upheld by the Pennsylvania courts as an exercise of the police power. While the United States Supreme Court has held that the taxation of canvassing in interstate commerce is a violation of the commerce clause of the Federal Constitution, it does not follow that it might not hold such a tax a proper exercise of the police power when the only question is whether it amounts to a deprivation of property without due process of law in violation of the Fourteenth Amendment.

While the defense of "Interstate Commerce" cannot be set up in Pennsylvania, the following decisions are cited simply as a matter of interest.

U. S. Supreme Court Decisions.

In re Nichols, 48 Fed. 164 (C. C., W. D. Pa.—1891).

In re Tyerman, 48 Fed. 167 (C. C., W. D. Pa.—1891).

Brennan vs. Titusville, 153 U. S. 289 (1894).

Rearick vs. Pennsylvania, 203 U. S. 507 (1906).

State Court Decisions.

Mearshon vs. Pottsville Lumber Co., 187 Pa. 16.

CHAPTER XXXII.

RHODE ISLAND.

EDWARDS & ANGELL,
Counsellors at Law.

170 Westminster Street,
Providence, R. I.

December 23, 1913.

Aluminum Cooking Utensil Co.,
Pittsburgh, Pa.

Dear Sirs:

On December 22, 1913, at your request, we interviewed Herbert A. Rice, Attorney General for the State of Rhode Island, for the purpose of obtaining his opinion as to whether or not your agents are subject to the provisions of our statutes requiring Itinerant Venders or Hawkers and Peddlers to procure a license. (Gen. Laws of R. I. 1909, Chapts. 191 and 192).

We stated to Mr. Rice that your Company is a Pennsylvania corporation having its main office in Pittsburgh and its only factory at New Kensington, Pa., where it manufactures cooking utensils; that it proposes to employ salesmen who shall travel through Rhode Island carrying samples of its products and soliciting orders for the same; that orders so received are to be forwarded to your Pittsburgh office and filled by shipping the products ordered direct from the factory to the salesman who is to deliver to the consumer; that the salesmen are to carry no goods except as samples and for the purpose of filling orders already received as aforesaid; and that neither your Company nor said agents is to maintain any stock of goods nor occupy any office or building in Rhode Island.

In conferring with Mr. Rice as to the effect of the statutes above referred to, we particularly called his attention to the following points:

(1) *The statute relating to Itinerant Venders Specifically excepts agents such as yours from its operation.* We pointed out to Mr. Rice two sections of this statute which plainly indicate this result. Under either one of these sections there can be little doubt that your agents are fully protected so far as this statute is concerned. One section provides that "the provisions of this chapter shall not apply********** *to bona fide sales of goods, wares and merchandise by sample for future delivery*********." (Gen. Laws of R. I. 1909, Chap. 192, Sec. 15.) Moreover, even in the absence of this specific language another section of the same statute limits the meaning of the phrase" Itinerant Venders" to persons who "engage in a *temporary* and *transient* business in this State**********and**********for the purposes of carrying on such business hire, lease or occupy any building or structure for the exhibition and sale of**********goods, wares and merchandise." (Gen. Laws of R. I. 1909, Chap. 192, Sec. 14.) We pointed out that the business of your agents in soliciting orders by sample was not necessarily a "temporary or transient business," that neither your Company nor said agents proposed to "hire, lease or occupy any building or structure" in this State and that, hence, by the definition of the statute itself, they were plainly not subject to its requirements.

(2) *The statute relating to Hawkers and Peddlers does not apply where agents (like your agents) merely solicit orders for goods.* In support of this construction we called Mr. Rice's attention to the fact that this statute purports to apply only to one "who shall as a Hawker or Peddler *sell* or offer *for sale* or *carry through or into* any town in the State, *to be sold or bartered* from packs, packages, horses, carts or other vehicles or in any other way**********goods, wares or merchandise********." (Gen. Laws of R. I. 1909, Chap. 191, Sec. 1); and that obviously this language has no application to persons who neither sell goods nor offer them for sale nor carry them for sale, but who merely *take orders* for goods according to sample.

(3) *If said statutes, as above pointed out, did not specifically except your agents from its operation, they would be unconstitutional as amounting to an improper interference with interstate commerce.* We showed Mr. Rice the numerous decisions of the Supreme Court of the United States whereby it has been repeatedly decided that statutes similar to those in force in Rhode Island would be unconstitutional if construed to apply to interstate commerce such as you propose to carry on through your agents.

The Attorney General examined with us very carefully the various provisions of the above mentioned statutes of this State and the authorities referred to. While he preferred not to be actually quoted in any way, nevertheless we gained the undoubted impression from our interview with him that he fully agrees with us that if you hire agents in this State and they conduct business as outlined above without first obtaining a license, they will not be liable as having violated the requirements of the statutes above named.

Very truly yours,
EDWARDS & ANGELL,
ELIOT G. PARKHURST.

CHAPTER XXXIII.

SOUTH CAROLINA.

In the town of **CLIO,** The Aluminum Cooking Utensil Company's salesman, Mr. E. L. Warren, was arrested for soliciting orders without having paid a license as required by the municipal ordinances.

The following judgment and court order gives the outcome:

STATE OF SOUTH CAROLINA,
COUNTY OF MARLBOROUGH,

Town of Clio
against
E. L. Warren.

Indictment for peddling without a Municipal License.

The above stated case was heard by me on appeal from the Municipal Court of the Town of Clio and after a full hearing and argument by J. K. Owens, Esq., for the Town of Clio and Geo. W. Brown, Esq., for the Defendant Appellant, I am satisfied that the Defendant, E. L. Warren was not engaged in hawking or peddling goods or wares, contrary to the Statute known as the hawker and peddler act or contrary to the license ordinance of the Municipalities in this State, but upon the contrary it appears that the defendant was merely soliciting orders for the future delivery of goods and wares, which at the time of the solicitation of the orders therefor were not within the State of South Carolina, but were upon such orders subsequently shipped into the State of South Carolina from the State of Pennsylvania by the Aluminum Cooking Utensil Company, an established business house or factory located at New Kensington, Pennsylvania, and then by the said defendant delivered to the several parties from whom he had taken said orders and consequently the said goods and wares were not the subject of legislative control upon the part of the State of South Carolina. The defendant was in no sense a hawker or peddler, the testimony showing that he neither carried around from place to place for the

purpose of selling or offering for sale such goods and wares, nor did he sell or offer to sell the same, and the testimony further shows that the said defendant was engaged in an interstate transaction and is therefore protected by the laws and regulations of interstate commerce and consequently he cannot be made to pay license for such interstate business.

Therefore it is ordered, on motion of Geo. W. Brown, defendant's Attorney, that so far as the notice and grounds of appeal of the defendant, to the ruling and judgment of the Mayor of Clio raised or point out errors made by the said Mayor, contrary to and inconsistent with this order and the findings herein made the same be and hereby are sustained.

It is further ordered that the judgment and sentence of the said Mayor made and pronounced against the said Defendant be and the same are hereby overruled and set aside, the prosecutions heretofore commenced against the defendant be dismissed and the cash bond heretofore deposited by the defendant in lieu of recognizance, pending hearing of this appeal, be refunded to him or to his Attorney.

JNO. S. WILSON,
Presiding Judge.

March 14, 1912.
STATE OF SOUTH CAROLINA,
COUNTY OF MARLBORO.

I, J. A. Drake, Clerk Court C. P—G. S. for Marlboro County in the State aforesaid, do hereby certify that the above is a true and correct copy of an order now on file in this office.

Given under my hand and official seal at Bennettsville, S. C., March 14, 1912.

J. A. DRAKE,
Clerk.
(Seal).

CHAPTER XXXIV.

SOUTH DAKOTA.

State Court Decisions.

State vs. Rankin, 11 S. D. 144.

CHAPTER XXXV.

TENNESSEE.

U. S. Supreme Court Decisions.

Robbins vs. Shelby County Taxing District, 120 U. S. 489 (1887).

Stockard vs. Morgan, 185 U. S. 27 (1902).

State Court Decisions.

Hurford vs. State, 91 Tenn. 669.

State vs. Scott, 98 id. 254.

Law Office
LINDSAY, YOUNG & DONALDSON,
East Tenn. Nat'l Bank Bldg.,
KNOXVILLE, TENN.
H. B. LINDSAY,
ROB'T S. YOUNG,
W. J. DONALDSON,
E. G. STOOKSBURY,

July 8, 1914.

ALUMINUM COOKING UTENSIL CO.,
New Kensington, Pa.

Gentlemen:

RE CANVASSERS' LICENSES IN TENNESSEE.

Replying to your letter of the 2d instant, making further inquiry as to the liability of canvassers to a privilege or license tax for soliciting orders for your goods, located outside of the State of Tennessee, to be shipped into the said state and delivered by the canvasser, as your agent, we have to say:

The canvasser engaged in this work, as your agent, is not liable for a state privilege or license tax because imposition of such a tax would be a burden upon interstate commerce and in violation of the Federal Constitution.

In the case of *Robbins vs. Taxing District*, reported in 13 Lea (81 Tenn.) at pages 303 to 310, the Supreme Court of Tennessee, held contrary to the opinion expressed above, but this very case was taken to the Supreme Court of the United States by a Writ of Error, and the latter court, speaking through Justice Bradley, reversed the decision of the Tennessee Supreme Court, holding that the negotiation for sale of goods, which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce; that such commerce is not subject to state taxation, and that the state cannot levy a tax or impose any other restriction upon the citizens or inhabitants of other states, for selling or seeking to sell their goods in such state. This was a case where the Taxing District of Memphis, Tennessee, sought to compel a traveling salesman to pay a tax for offering for sale goods belonging to his non-resident principal, located in a different state. Your attention is especially directed to this case which is settled by the court of last resort having jurisdiction of such a question: *Robbins vs. Taxing District of Shelby County, Tenn.*, 120 U. S. Supreme Court Reports, pages 489 et seq.

In the case of *Hurford vs. State*, reported in 7 Pickle (91 Tenn.), at pages 669 to 676, the Supreme Court of Tennessee expressly adopted and followed the decision of the U. S. Supreme Court in the case of *Robbins vs. Taxing District.* In this latter case Judge Lurton, who has since been elevated to the position of associate Justice of the Federal Supreme Court, held that a State Revenue Act imposing privilege tax upon persons selling goods to consumers by sample, and declaring it a misdemeanor to do so without payment of this tax, is invalid, as an unlawful regulation of interstate commerce, in so far as it shall be applied to persons, not residents of the state, who, as agents or drummers take orders in this state from consumers for sale of goods of their non-resident principal situated outside of the state—the orders to be sent to such non-resident seller, and the goods forwarded by him, in compliance with their terms, to the buyer.

In the case above referred to the Supreme Court of Tennessee said:

> "In all its substantial particulars, this case is identical with *Robbins vs. Taxing District*, 13 Lea, 303. This Court then held that the tax on drummers was not a regulation of commerce between the States, although

the agent was a non-resident, who sold, by sample, goods without the state for non-resident principals, and was not, therefore, obnoxious to that clause of the Constitution of the United States, which declares that Congress shall have power to regulate commerce between the states. Upon a writ of error to the Supreme Court of the United States, our judgment was reversed and the Act imposing the privilege tax held to be obnoxious to the interstate commerce clause of the Federal Constitution, in so far as it was sought to apply it to the non-resident agent of non-resident principals, who sold, *by sample, goods not within the state at the time of sale. Robbins vs. Taxing District*, 120 U. S. 489.

"*It is of no substantial importance, under that decision, whether the drummer negotiates a sale with a dealer or a consumer, and it is equally unimportant as to how the delivery is to be made.* If the order is sent out of the state, and the goods afterwards sent into the state to fill it, it is immaterial whether delivery to the buyer is to be by a carrier, a postmaster, or by an agent of the seller, to whom they are sent for delivery in pursuance of a sale previously negotiated while the goods were without the state. The view of this court was that such a tax was imposed on the occupation of drumming, and, if it did not discriminate between residents and non-residents, that it was not a regulation of interstate commerce. These views did not meet the indorsement of the Supreme Court of the United States. That court, with reference to questions arising upon the Constitution of the United States, is the Court of last resort. It is our duty, with respect to such questions, to conform our judgments, where a Federal question arises, to the opinions of that court. We are, therefore, constrained to hold, in the language of that court, that 'the negotiation of sales of goods, which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce,' and that a tax upon an agent exclusively engaged in making such sales is a tax upon interstate commerce, and obnoxious to the Constitution of the United States."

In the case of *State vs. Scott*, the Supreme Court of Tennessee, again reaffirmed the doctrine laid down in the case of *Robbins vs. Taxing District.* This case is reported in 14 Pickle (98 Tenn.) at pages 254 to 262, and holds that a statute violates the commercial clause of the Federal Constitution, and is void, which imposes a privilege tax upon persons other than photographers of this state soliciting pictures to be enlarged outside of this state. In this case the soliciting agent took orders from citizens of this state, and forwarded them, with the small pictures to citizens of other states, who for stipulated prices made

enlarged pictures and sent them from the other states into this state *to or for the person giving the order.* In this case the State Supreme Court said:

> "Several cases involving the validity of state laws, whereby a license or privilege tax was laid upon drummers or soliciting agents, with principals in other states, as in the present case, have been before the Federal Supreme Court in late years; and in every instance, so far as we are advised, that court has held those laws to be unconstitutional and void because imposing a burden upon interstate commerce. The following are some of those cases: *Robbins vs. Shelby Taxing District*, 120 U. S. 489; *Asher vs. Texas*, 128 U. S. 129; *Stoutenburgh vs. Hennick*, 129 U. S. 141; *McCall vs. California*, 136 U. S. 104; *Brennan vs. Titusville*, 153 U. S. 289."

Out attention has been directed to two later decisions of the State Supreme Court, one being *Kimmell vs. State*, 20 Pickle (104 Tenn.), pages 183–184, and the other *Croy vs. Obion County*, 20 Pickle (104 Tenn.), page 525. In both these cases the solicitors were held liable for the privilege tax upon the ground that they were acting for themselves, and were selling goods which had been shipped into the state and had become a part of the mass of the property of the state before the sales thereof had been finally perfected. In our opinion these cases do not touch the case where an agent is in good faith representing a non-resident seller, and is acting as an agent of the non-resident seller in making deliveries of the goods sold. In the Kimmell case our Supreme Court used this language:

> "Kimmell testified that he sold the goods by sample to citizens of Springfield in Robertson County, Tennessee; that he made the sales as the agent, and subject to the approval of the L. B. Price Mercantile Company, of Kansas City, Missouri; that he forwarded his orders to a branch house of his principal at Lexington, Kentucky, from which he received the goods ordered, and then delivered them to the purchasers.
>
> 'This testimony, considered alone, makes a plain case of interstate commerce. It shows commercial transactions between citizens of different states, and such transactions constitute interstate commerce, which, though conducted by an agent, cannot be subjected to the burden of taxation under state laws. *State vs. Scott*, 98 Tenn. 254, and citations.' "

As stated above, however, on other grounds the solicitors in both of the last named cases were held liable for the privilege tax.

In our opinion, therefore, if your agent solicits orders, and makes sales for you in this state, of goods located in another state, and delivers the goods to the particular buyers when they are shipped into this state, neither you nor he would be subject to the payment of a privilege tax because this would be directly in violation of the Constitution of the United States, relative to interstate commerce.

Yours very truly,

d–b LINDSAY, YOUNG & DONALDSON.

CHAPTER XXXVI.

TEXAS.

U. S. Supreme Court Decisions.

Asher vs. Texas, 128 U. S. 129 (1888).

State Court Decisions.

Ex parte Holman, 36 Tex. Crim. Rep. 255.

Talbutt vs. State, 39 id. 64.

Turner vs. State, 41 id. 545.

Harkins vs. State, 75 S. W. 26.

AUSTIN, TEXAS, February 17, 1914.

To HON. B. F. LOONEY,
Attorney General,
Austin, Texas.

Dear Sir:

The Aluminum Cooking Utensil Company is a Pennsylvania Corporation, having its principal office in the City of Pittsburgh, and its manufacturing plant at New Kensington, Pa., at which latter point alone it manufactures cooking utensils, which it sells in various states of the Union, the business being conducted in the following manner: This Company employs traveling salesmen who solicit orders in the different states, which are forwarded to the Company at Pittsburgh (except that some orders are forwarded to East St. Louis, Ill., and Portland, Oregon, to be filled from a stock of goods kept at those points), the orders are filled and the goods shipped to the salesmen to be delivered to the respective purchasers. No goods are sent to the salesmen, except

to fill orders actually received, and the Company carries no stock of goods in any states except in Pennsylvania, Illinois and Oregon. The said Aluminum Cooking Utensil Company never sends any goods into Texas, until they have been ordered by the customer.

It is the custom of the said Company to employ during the Summer months of each year a great number of students from the various colleges and universities in this and in other states to act as their agents and demonstrators in the sale and proof of their wares and for this service the agents and demonstrators are paid sufficient commission to enable them to remain in the schools of the state on their own expense. In the pursuance of this vocation many students are enabled to take advantage of the educational facilities provided, especially at the University of Texas, from which institution approximately fifty men are employed by this Company.

During the last few months notice has come to the students thus engaged from the University of Texas, that the agents of the said Company have been subjected to considerable embarrassment and inconvenience in neighboring states, due to the interference of municipal authorities in the cities and towns who have sought to require a License Tax or "Peddler's License" from these agents, and in a few instances imprisonment has resulted from their failure to produce the License Receipt. Of course when these instances were presented to a competent court, the unfortunate agent was released, but these instances lately occurring have produced an unwholesome effect on the minds of those students who do not understand the nature of "Uncle Sam's" protection. This precise question is at present bothering many student agents who entertain fears that they will be molested and harassed in a similar manner during the approaching Summer. These agents would greatly appreciate a statement from you that the occupation as above set forth is not subject to interference by local and state authorities as far as the requirement of an occupation tax or "Peddler's License" is concerned, the business being clearly "Interstate Commerce."

INTERSTATE COMMERCE.

"Interstate Commerce consists of intercourse and traffic between citizens or inhabitants of different states and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities." *Barnhard Bros. vs. Morrison*, T. C. A.—, 87 S. W. 376 (1905).

The sole power to prescribe rules by which interstate commerce shall be governed shall be vested in Congress. Supra, also U. S. Const. Art. 1, Sec. 8.

A foreign corporation which manufactures or deals in goods which are the subject of commerce may send its agents into this State to solicit orders for the sale of such goods without being embarrassed or obstructed by being required to take out licenses, establish resident agencies, or file certificates required by the laws of the domestic state. *Barnhard vs. Morrison*, supra; *Brennan vs. Titusville*, 153 U. S. 289; *Mitler vs. Goodman*, 91 Tex. 41; *Gale Mfg. Co. vs. Finkelstien*, 22 T. C. A. 241; *Commonwealth vs. Hogan* (Kentucky) 74 S. W. 737.

STATE TAXATION OF:

"A state can make no law imposing directly or indirectly a burden by way of taxation upon Interstate Commerce." *G. C. & S. F. Ry. Co. vs. Dwyer*, 75 Tex. 572, 579.

Under the Act of 1889, providing that every person peddling cooking stoves or ranges shall pay an Occupation Tax, a person acting as Manufacturer's agent, taking orders for stoves to be shipped from the factory in another state, in three separate parcels, and be delivered and set up by another employee of the manufacturer is within the protection of the Interstate Commerce clause of the Federal Constitution. *Harkins vs. State*, (T. Cr.) 75 S. W. 26. The Statute referred to above is Art 7355, R. S. 1912, Secs. 11, 12.

"The above and foregoing facts do not constitute appellant a peddler within the contemplation of the statute. Then he must necessarily be a drummer or agent, and being such and representing non-resident corporation, soliciting orders for goods, comes within the protection of interstate commerce clause of the U. S. Constitution." Supra, citing *Ascher vs. Texas*, 128 U. S. 129; *Robins vs. The Shelby Taxing District*, 120 U. S. 489; *Hopkins vs. U. S.*, 171 U. S. 602.

In *Cones & Son Mfg. Co. vs. Rosenbaum*, (T. C. A.) 45 S. W. 333, the sale by a foreign corporation of goods made in Indiana and shipped into Texas, *after they were bought*, is Interstate Commerce; and in action therefor it is unnecessary to allege and prove that a permit to do business in Texas was obtained.

Such sale negotiated by a drummer comes within the protection of the Interstate Commerce Clause. *Bateman and Bro. vs. Western Milling Co.*, 1 T. C. A., 90. The above is followed in *American Starch Co. vs. Bateman* (T. C. A.), 22 S. W. 771.

In *Ascher vs.* ————, T. Cr. ————, the court held that imposing an Occupation Tax upon Commercial Travelers, Drummers, or Solicitors of trade, selling by sample is not an unconstitutional regulation of commerce between the states, at that time citing the Robbins case, and distinctly going contrary thereto. However this case was taken up to the U. S. Sup. Ct. by Ascher where that court held: "The State possesses power to impose an occupation tax without discrimination upon its own citizens; but the statute imposing such tax when applied to citizens of another state is incorrect, and unconstitutional," same as *Robbins vs. Shelby Co. Tax. Dist.* where the State of Tennessee levied by statute a tax on drummers, travelling for houses not licensed to do business in Tennessee. The drummer traveled for an Ohio house. Cites; *Le Loup vs. Port of Mobile, etc.*, 127 U. S. 640.

Holman Case, 36 T. C. R. 255, 36 S. W. 441, declared the law incorrect and unconstitutional requiring payment of license for soliciting orders of Photos, etc., when applied to the present case. The proof showed "he was operating this business as the agent of a corporation situated in Chicago, Ill., which maintained no place of business in Texas. Cites and follows: *Brennan vs. City of Titusville*, supra.

HAWKERS AND PEDDLERS.

"A peddler is a person who is a foot trader, according to the original signification of the appellation, but by custom it has come to be a person who travels from place to place and carries about with him, on his back, or on horseback, or in a vehicle of some kind, articles of merchandise *for sale where he goes.*" *Higgins vs. Rinkler*, 47 Tex. 393. The above definition has never been disaffirmed by any court in Texas, and is quoted with authority in the following cases: *Randolph vs. Yellowstone Kit*, 83 Ala. 472, 3 South. 707; *Kennedy vs. People* (Colo.) 4 Pac. 375; *Kansas vs. 34 Kans.* 437, 8 Pac. 867, also approved and followed in 72 Fed. 855.

A state may not lay any tax or burden on any articles of commerce from another state until such goods have become mingled with the mass of property in the state laying the burden. *Brown vs. Maryland*, 12 Wheat. 425.

When the goods have become mingled with the mass of property in a state it may be taxed as goods of that state, but not until then, at which time the tax must not be discriminatory. *Welton vs. Missouri*, 91 U. S. 275.

One selling ranges by sample, taking orders for future delivery to

be paid for only on such delivery, is not a "peddler" within the Act of 1889. *Potts vs. State*, 74 S. W. 31, citing *Welton vs. Missouri*, supra, and numerous other cases.

Sale by sample is not peddling. *Potts vs. State*, supra.

"A person who sells goods by sample but does not deliver at the time of the sale is not a peddler." "CYC," Vol. 21, Page 320.

U. S. Supreme Court Cases where the question submitted above has been ruled squarely to come within the protection of Interstate Commerce Clause of the U. S. Constitution:

Caldwell vs. North Carolina, 187 U. S. 622, decided in 1902, (portrait agent). *Rearick vs. Pennsylvania*, 203 U. S. 507, decided in 1904, orders taken in Pennsylvania, filled by principal in Ohio, and forwarded from Ohio to the agent in Pennsylvania for delivery, etc. *Dozier vs. Alabama*, 218 U. S. 124 (1909), a picture agent case. *Kehrer vs. Stewart*, 197 U. S. 60 (1904), a case where agent of a Chicago principal sold meat in Atlanta, Ga., and made delivery. *Robbins vs. Shelby Taxing Dist., Supra.*

If in your opinion the above citations furnish evidence sufficient that the business these students are intending to engage in is under the protection of the Interstate Clause of the U. S. Const., and does not come under the accepted definition of "peddling," they and others engaged in like work will appreciate a ruling from you that their pursuit is free from interference by the state and municipal authorities so far as the imposition of license and tax for the occupation.

Very truly yours,
ROBERT J. SULLIVAN.

OCCUPATION TAX—INTERSTATE COMMERCE—PEDDLING—SOLICITING ORDERS.

1. The term "peddler" defined.
2. A license tax may be constitutionally imposed upon peddlers because they are not engaged in interstate commerce.
3. Sec. 39 of Art. 7355, R. S. 1911, is invalid in so far as it attempts to impose an occupation tax upon the soliciting of orders for goods for future delivery where the execution of the contract of sale requires the transportation of the goods sold from one state into another, because

such a tax is an imposition upon interstate commerce and prohibited by the federal constitution.

4. The fact that goods ordered are shipped in bulk to and delivered by the salesman to the respective purchasers, is immaterial if the transaction has in other respects the character of interstate commerce.

5. However, if for any reason goods ordered are not delivered and are left on hand, a re-sale thereof would not be protected as interstate commerce, and such salesman would be amenable to the license tax laws of this state.

AUSTIN, TEXAS, February 24, 1914.

HON. ROBERT J. SULLIVAN,
County Attorney,
Conroe, Texas.

Dear Sir:

Under date of the 17th inst., you make the following statement to this Department with reference to a certain business that is proposed to be conducted in this state:

> "The Aluminum Utensil Company is a Pennsylvania Corporation, having its manufacturing plant at New Kensington, Pa., at which latter point alone it manufactures cooking utensils, which it sells in various states of the Union, the business being conducted in the following manner: This Company employs traveling salesmen who solicit orders in the different states, which are forwarded to the Company at Pittsburgh (except that some orders are forwarded to East St. Louis, Ill., and Portland, Oregon, to be filled from a stock of goods kept at those points), the orders are filled and the goods shipped to the salesmen to be delivered to the respective purchasers. No goods are sent to the salesmen, except to fill orders actually received, and the Company carries no stock of goods in any states, except in Pennsylvania, Illinois and Oregon. The said Aluminum Cooking Utensil Company never sends any goods into Texas, until they have been ordered by the customer."

The question you ask as whether or not the business to be pursued, as outlined by you, will be protected as interstate commerce, or would it be subject to a license tax either as peddling or otherwise.

The business you describe is not that of peddling. The courts of

the country have uniformly held that a license tax may be constitutionally imposed upon peddlers, because not engaged in interstate commerce.

Emert vs. State of Missouri, 156 U. S. 296.

Commonwealth vs. Harmel, 166 Pa. St. 89.

Commonwealth vs. Dunham, 191 Pa. St. 73.

Rash vs. Farley, 91 Ky. 344.

State vs. Gauss, 85 Iowa, 21.

State vs. Agee, 83 Ala. 110.

Hall vs. State, 39 Fla. 637.

State vs. Gorham, 115 N. C. 121.

The term "peddler" has many varities of definitions, but the popular definition is:

> "A small retail dealer who carries his merchandise with him, travels from house to house and from place to place, either on foot or horse back or in a vehicle drawn by one or more animals, exposing his goods for sale and selling them."

Randolph vs. Yellowstone Kit, 84 Ala. 472.

Also see numerous authorities cited in Words and Phrases, Vol. 6, Page 5261.

This definition of a peddler has been applied in numerous cases, among others the following, which show clearly the nature of the employment that is called peddling:

> "A peddler is a dealer or trader in small wares, who has no permanent place of business, but carries his wares with him from place to place or from house to house. He is one who buys to sell again, whose gains are the profits realized on small sales."

12 L. R. A. 624.

> "A peddler is an itinerant who goes from place to place and from house to house carrying for sale and exposing to sale the goods, wares and merchandise he carries. He generally deals in small and cheap articles such as he can conveniently carry in a cart or on his person."

Commonwealth vs. Farnum, 114 Mass. 267.

> "A peddler is one who sells anything having value, bought by him and sold from place to place in small quantities."

Roy vs. Schuff, 51 La. Ann. 86.

> "Or one who carries about with him the article of merchandise which he sells; that is to say, the identical merchandise he sells he has with him and delivers at the time of sale."

50 La. Ann. 574.

52 La. Ann. 694.

> "The term "peddler" includes any one who goes from place to place to peddle or retail goods, wares or other things, without regard to the distance between the different places visited in so doing."

West vs. City, 65 S. W. 120.

Rapalje defines a peddler to be:

> "A person who carries goods from place to place for sale."

While Webster defines a peddler to be:

> "A traveling trader; one who carries about small commodities upon his back, on a cart or on a wagon and sells them."
>
> "By peddling we understand to go around from house to house or from customer to customer and sell goods."

Du Boystown vs. Rochester, 9 Pa. Co. Ct. R. 442.

It is useless to quote other definitions, as they are all to the same effect and mean substantially the same. It is therefore easy to determine that the business you describe is not that of peddling.

The only statute in this state levying a tax on the business of soliciting orders for sales such as you describe is Sec. 39 of Art. 7355, Acts of 1911, which reads as follows:

> "From every person, firm or association of persons selling on commission, if in a city of more than ten thousand inhabitants, fifty dollars; if in a city or town of less then ten thousand inhabitants, twenty-five dollars. This article is intended to cover every person, firm or association of persons selling on samples only, and who do not carry any stock of merchandise or anything else on hand; provided, that this tax shall not apply to commercial travelers or salesmen making sales or soliciting trade from merchants."

It seems that this occupation tax is levied on every person who sells on samples, to people other than merchants, as commercial travelers or salesmen soliciting trade from merchants are specially excepted.

The question is, as to the validity of this statute, in so far as it applies to traveling solicitors for sale of goods for future delivery where the execution of the contract of sale requires the transportation of the goods sold from one state into another.

In our opinion such a tax is an imposition upon interstate commerce and prohibited by the federal constitution in so far as it applies to the soliciting of orders for the sale of goods to be transported from one state into another.

Mr. Tiedman, in his work entitled "State and Federal Control of Persons and Property," Vol. 2, Sec. 218, among other things, states the rule of law governing this subject as follows:

> "But when the traveling salesman receives an order for goods, the executory contract of sale is made by him on the spot, to be performed, however, subsequently by the transportation of the goods to and their delivery at the place of sale, and if the principal and the goods are outside the state in which the sale was made the transaction is interstate commerce. The levy of a license tax upon such a transaction would necessarily be a tax upon interstate commerce, which is prohibited not only by the interstate commerce clause of the United States constitution, but also by Article 1, Section 10, of the same constitution, which prohibits the imposition of a state tax upon imports and exports**********But the imposition of a license tax upon a traveling salesman who solicits an receives orders for goods for future delivery is void because he is engaged in interstate commerce in every case in which the performance of the contract of sale involves the transportation of goods from one state to another or the transfer of title to goods which are located in some other state than that in which the sale was made."

In support of this doctrine the author has cited numerous authorities in Note 2, at Page 1029.

There can scarcely be a doubt, in the light of these authorities, that the business you describe is interstate commerce, and that the same is exempt from the occupation tax imposed by the statutes of this state. The authorities cited by you in presenting your question fully sustain this proposition, and in order that the collection of authorities you have made may not be lost I will reproduce them in this connection, as they are pertinent to this inquiry.

> "Interstate commerce consists of intercourse and traffic between citizens or inhabitants of different states, and includes not only the transportation of persons and

property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities."

Barnhard Bros. vs. Morrison, 87 S. W. 376.

"The sole power to prescribe rules by which interstate commerce shall be governed is vested in Congress alone."

U. S. Constitution, Art. 1, Sec. 8.

"A foreign corporation which manufactures or deals in goods which are the subject of commerce may send its agents into another state to solicit orders for the sale of goods without being required to pay a license tax or to establish resident agencies or file certificates required by the laws of the domestic state."

Brennan vs. Titusville, 153 U. S. 289.

Mitler vs. Goodman, 91 Tex. 41.

Gale vs. Finkelstein, 21 T. C. A. 241.

Commonwealth vs. Hogan (Ky.) 74 S. W. 737.

"A state can neither directly nor indirectly place a burden by way of taxation upon interstate commerce."

G. C. & S. F. Ry. vs. Dwyer, 75 Tex. 572.

"Under an Act of 1889, providing that every person peddling cooking stoves or ranges shall pay an occupation tax, a person acting as manufacturer's agent, taking orders for stoves to be shipped from the factory in another state in three separate parcels and to be delivered and set up by another employee of the manufacturer, is within the protection of the interstate commerce clause of the federal constitution."

Harking vs. State, 75 S. W. 26.

Also to the same effect see *Ascher vs. Texas*, 128 U. S. 129.

Robins vs. The Shelby Taxing District, 120 U. S. 489.

Hopkins vs. U. S., 171 U. S. 602.

Cohns & Sons Mfg. Co. vs. Rosenbaum, 45 S. W. 333.

Bateman vs. Western Milling Co., 1 T. C. A. 90.

Starch Co. vs. Bateman (T. C. A.), 22 S. W. 771.

Le Loup vs. Port of Mobile, 127 U. S. 640.

In your statement of facts it does not appear whether the goods are to be shipped direct to the purchaser or to the salesman to be delivered; neither does it appear whether the goods are to be shipped in separate packages according to each order or in quantities sufficient in amount to fill the orders to be by the salesman unpacked, assorted and delivered, according to each order respectively.

We believe, however, that these considerations are immaterial and would not of themselves change the interstate character of the transaction if in other respects it belonged to that category. Mr. Cook, in his work on the commerce clause of the federal constitution (Sec. 75), in discussing this phase of the subject, states the law as follows:

> "And commonly, though not necessarily, the restriction is in the form of a tax or fee upon such agent; that is to say, imposed upon him as a condition of entering into such a contract of sale, a tax upon the seller being justly regarded as in effect upon the article sold. As in the case of the restrictions just considered (a license tax), the imposition of such a restriction upon the contract of sale is clearly established to be invalid, and it is none the less invalid because of the property in such article not passing to the buyer until delivery to him, thus upon payment of the price. Nor does it ordinarily make any difference that transportation is not directly from the seller to the buyer; thus it may be directly from the seller to his agent in the State, and thereafter from the agent to the buyer. Nor does it make any difference, as commonly happens, for convenience sake, the articles are transported 'in bulk' to the agent, who thereafter 'breaks' the bulk and makes distribution of the articles therein contained to the respective buyers."

The Caldwell case, 187 U. S. 622, was where a Chicago Portrait Company, of Chicago, Ill., employed agents to sell pictures and picture frames in North Carolina; the Portrait Company shipped large packages of pictures and frames for which it received orders from its soliciting agent, the consignment being made to another agent of the Company also of Greensboro, the shipment being addressed to the Chicago Portrait Company. The receiving agent broke the bulk, placed the pictures in their proper frames and delivered them to the respective purchasers. The agent thus delivering was arrested for failing to comply with an ordinance of the City of Greensboro, which imposed a license tax on the business of selling and delivering pictures, frames, etc. The Supreme Court held that this ordinance as applied to the facts of this case was invalid in that it was an interference with interstate commerce, and among other things the court said:

> "Nor does the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to an agent of the vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. It was only that the vendor used two instead of one agency in the delivery. It would seem evident that if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation. The same could be said if the vendor himself, or by a personal agent, had carried an delivered the goods to the purchaser. That the articles were sent as freight by rail and were received at the railroad station by an agent who delivered them to the respective purchasers, in nowise changes the character of the commerce as interstate."

The case of *Dozier vs. Alabama* (1909), 218 U. S. 124, called in question a statute of Alabama that imposed a license tax for soliciting orders for the enlargement of photographs or for picture frames, on all persons not having a permanent place of business in the state. The Chicago Crayon Company, with its place of business in Chicago, solicited orders in Alabama without paying this tax. The orders were given for the portraits and included an option to purchase the frame in which the portrait should be placed. The portraits and frames were sent to the agents of the Company in Alabama, and he made deliveries and collected for the same. The agent was tried and fined in the state court for violating this statute, and the Supreme Court of Alabama, while admitting that the dealings concerning the portraits were interstate commerce, sustained the conviction on the ground that the sale of the frame was wholly a local matter. The Supreme Court of the United States reversed the Alabama Court on the ground that the attempt to apply the statute in question was in violation of the commerce clause of the federal constitution. While at the time the orders were given the purchaser did not contract to take the frames, but merely obtained an option to take them, and on this point the court says (p. 127-8):

> "No doubt it is true that the customer was not bound to take the frame unless he saw fit, and that the sale of it took place wholly within the State of Alabama, if a sale was made. But, as was held in *Rearick vs. Pennsylvania*, 203 U. S. 507–512, what is commerce among the states is a question depending upon broader consideration than the existence of a technically binding contract or the time and place where the title passes."

The case of *Rearick vs. Pennsylvania*, 203 U. S. 509–513, presented

the following facts: An Ohio corporation employed an agent to solicit retail orders for the sale of groceries in the State of Pennsylvania. When the Company had received a large number of orders it filled them at its business place in Columbus, by putting up the objects of the several orders in distinct packages and forwarded them to the agent by rail addressed to him for A, B. C, etc., the respective persons giving the orders. The Company kept the orders but kept no book accounts with the customers, looking only to their agent. This agent alone had authority to receive the goods from the railroad, and when received by him he delivered them, as was his duty, to the customers and made collection and forwarded the same to his principal. The customer had the right to refuse the goods if not equal to the sample shown to him when he gave the order. In cases of non-delivery the defendant returned the goods to Columbus. No shipments were made to the defendant, except to fill such orders, and no deliveries were made by him except to the parties named on the packages. In the case of brooms they were tagged and marked like other articles according to the number ordered, but they then were tied together into bundles of about a dozen, wrapped up conveniently for shipment. The agent was prosecuted under a state law imposing a license tax, and his defense was that the state law was invalid in that it was an imposition upon interstate commerce prohibited by the federal constitution. In disposing of the case the court, among other things, said:

> "It will be seen from the insertion of the statement concerning the brooms that a ground relied upon by the prosecution to avoid that conclusion was that the goods, or at least this part of them, were not in the original packages when delivered, and that therefore the case did not fall within decisions of the court cited."

Under the facts stated above the Supreme Court held that the law of Pennsylvania in question did not apply to these transactions, and that the same were protected as interstate commerce, and that the license tax in question was an interference therewith.

We therefore conclude that whether the goods are shipped to the purchasers direct or to the agent for distribution, or whether each order was bound into a bundle separately and tagged with the name of each purchaser or in some other way to disassociate it from others, or whether the quantity, representing the aggregate of orders, is sent to the salesman to be by him separated and the amount of each order assembled and delivered, become and are immaterial considerations, and that the absence or existence of either of these elements would not change the

nature of the transaction, if it in other respects had the nature of interstate commerce.

Another material matter not mentioned by you is this: That is, in your statement nothing is said as to the method, if any, of disposing of goods that are not accepted by the purchaser, or where for any reason goods are left on hand undelivered.

If goods left on hand and not delivered are to be returned by the salesman or agent to the manufacturer, no difficulty is presented, but if the salesman or agent under such circumstances is authorized to sell such left-overs, he would clearly be amenable to the tax laws of this state, because under such circumstances the re-sale would not be, and could not receive protection as, interstate commerce.

This proposition seems to follow as a necessary corollary from the general principles controlling this subject, but the following case seems to be directly in point. In the case of *State vs. Cohen*, 70 Pac. 600, 65 Kans. 849, the defendant, an employee of a wholesale liquor house located at St. Joseph, Mo., was engaged in soliciting orders for the sale of intoxicating liquors in the State of Kansas. When such orders were received they were forwarded to the house, and if approved the liquors would be shipped to each person ordering respectively. In the course of the business so conducted often persons ordering would fail to pay and receive the goods, in which event they would remain stored at the depot until another order corresponding in amount and character to the goods shipped and left over was made, and thereupon it was sought to fill the latter order with these left-over goods. In disposing of this case the court said:

> "Whatever may be the right of the defendant under the law as a traveling salesman engaged in soliciting orders for a house located in a foreign state, where such orders are received, accepted and filled in such state and liquors ordered and delivered to a common carrier for transportation into and delivery to the purchaser in this state, the transaction here shown cannot be justified in law. It constituted an unlawful sale and violation of the law."

If, therefore, in the process of conducting the business outlined in your letter any goods should be left over and not delivered to the person ordering the same and not returned to the Company, but should be sold to other purchasers subsequently found, this would clearly not be interstate commerce, and the salesman or agent would be taxable and amenable to a criminal prosecution for failure to pay the tax and obtain the license.

It is the opinion of this Department, and you are so advised, that the pursuit of the business described in the first paragraph of your communication quoted herein is that of interstate commerce, and that those soliciting orders for sales under the circumstances, as mentioned, will be exempted from any occupation tax imposed by the statutes of this state, for the sufficient reason that the same is interstate commerce pure and simple as adjudicated over and over again in similar cases.

Yours very truly,
B. F. LOONEY,
Attorney General.

BFL—S&mm

This opinion has been passed upon and approved by the Department in executive session, and is now ordered recorded.

B. F. LOONEY,
Attorney General.

CHAPTER XXXVII.

VERMONT.

FRED E. GLEASON,
Attorney and Counsellor at Law,
43 State Street.

MONTPELIER, VERMONT, December 9, 1913.

HON. RUFUS E. BROWN,
Burlington, Vt.

Dear Mr. Brown:

I desire to trespass upon your time to submit a proposition which has come to attention in Vermont and in other states in order that I may if possible obtain an opinion from you which may serve as a guide for action in the future with regard to this corporation.

The Aluminum Cooking Utensil Company is a Pennsylvania corporation with principal office at Pittsburgh and manufacturing plant at New Kensington, Pennsylvania, at which latter point alone the Company manufactures cooking utensils which are being sold in various states in the following manner.

The Company employs traveling salesmen who carry samples of its goods and solicit orders by a house to house canvass. Orders thus received are forwarded to the office of the Company in Pennsylvania and filled at New Kensington, the goods being shipped to the salesmen to be delivered to the various purchasers. No goods are given the salesmen except to fill orders actually received and the Company carries no stock of goods in any of the states except Pennsylvania as above indicated and at East St. Louis, Ill., and Portland, Ore., for the sake of convenience.

It would further appear that this Company is conducting an interstate business and that its agents do not come within the provisions of Local Statutes or Ordinances intended to apply to peddlers and hawkers, and that, therefore, such agents ought not to be required to pay fees or procure licenses, provisions for which may be made locally.

The Company is endeavoring to obtain from the attorney general of each state an opinion to the effect that the agents of the Company come under the Interstate Commerce Laws, and are, therefore, exempt from Local Statutes, Ordinances, license fees, and interference, in order that in the respective states these opinions may prevent loss of time and expense, and I enclose herewith a copy of a communication from Hon. Grant Fellows, Attorney General of the State of Michigan, several other states thus far having agreed to the proposition and their respective attorneys general having issued similar opinions.

I trust you will do me the courtesy to advise me at your earliest convenience of your opinion in the matter or whether you would care to be quoted in regard to the same, and assuring you that your reply will be greatly appreciated by

Yours respectfully,
FRED E. GLEAS

FEG—PH

State of Vermont

OFFICE OF
ATTORNEY GENERAL

RUFUS E. BROWN
ATTORNEY GENERAL
BELLE M. ROSS
SECRETARY

Burlington, Dec. 11, 1913.

Fred E. Gleason, Esq.
Montpelier, Vt.

Dear Sir:-

I have your letter of Dec. 9th, regarding the travelling salesmen of The Aluminum Cooking Utensil Company. You of course understand that it is not the custom of this office to furnish opinions regarding matters of this nature solely for the benefit of private interests. Regarding the matter under consideration however, it seems to me that there can be no difference of opinion. I feel entirely confident that the agents of this concern doing business as indicated in your letter and in the copy of the communication from the Attorney General of the State of Michigan, do not come within the provisions of the peddlers law and cannot be compelled to procure a license of any kind.

Very respectfully yours,

REB/BMR.

R. E. Brown
Attorney General.

CHAPTER XXXVIII.

VIRGINIA.

State Court Decisions.

Adkins vs. Richmond, 98 Va. 91.

CHAPTER XXXIX.

WEST VIRGINIA.

State Court Decisions.

State vs. Lichtenstein, 44 W. Va. 99.

CHAPTER XL.

WYOMING.

State Court Decisions.

Clements vs. Town of Casper, 4 Wyo. 494.

State vs. Willingham, 9 id. 290.

CHAPTER XLI.

INSULAR POSSESSIONS OF THE UNITED STATES.
Territories of Hawaii, Porto Rico and Philippine Islands.

GEORGE B. GORDON,
WILLIAM WATSON SMITH,
RALPH LONGENECKER,
ALLEN T. C. GORDON,
ALEXANDER BLACK.

MILES H. ENGLAND,
JOHN G. BUCHANAN.

GORDON & SMITH,
Attorneys at Law,
Frick Building Annex.

PITTSBURGH, PA., February 20th, 1914.

MR. P. J. URQUHART, Treasurer,
Aluminum Cooking Utensil Company,
New Kensington, Pa.

Dear Sir:

In a letter to us of the 2d ult. you inquired whether salesmen of your company, if sent to Hawaii, Porto Rico, or the Philippines, would be protected from the payment of license taxes in the same way as your men working in other states of the Union. We assume that your business in the places mentioned would be conducted in the manner indicated in our letter to Mr. G. R. Gibbons of April 28th, 1913, and upon this assumption beg to advise you as follows:

Your salesmen in most of the states of the Union are protected from the payment of state or municipal license taxes because such taxes would amount to an interference with "commerce********** among the several states," the regulation of which is put by the Federal Constitution in the hands of Congress. Is commerce between this

state and Hawaii, Porto Rico, or the Philippines "commerce********** among the several states" within the meaning of the Constitution? A positive answer to this question cannot, we believe, be given in the present state of the authorities. We shall cite, as illustrative of the cases to be taken into account in answering the question, a number of the decisions on the meaning of the word "state" as used in the Federal Constitution and statutes and on the status of the various territories and possessions of the United States.

In *Hepburn vs. Ellzey*, 2 Cranch 445, it was held that the District of Columbia is not a state within the meaning of the provisions of the Judiciary Act of Congress and the Judiciary Article of the Constitution, Chief Justice Marshall saying that "the members of the American confederacy only are the states contemplated in the constitution" (see pages 452–453). To the same effect are *Barney vs. Baltimore*, 6 Wall. 280 (see per Miller J., pages 287–288); Swayne, J., in *Railroad Co. vs. Harris*, 12 Wall. 65, at page 86. The same ruling has been made as to the territories: *New Orleans vs. Winter*, 1 Wheat. 91 (see per Marshall, C. J., page 94); *Watson vs. Brooks*, 13 Fed. 540, in which last case, however, Deady, D. J., severely criticizes the rule. So, also, it has been held that the provision of the Judiciary Act providing for a writ of error in certain cases relating to a statute of a *state* does not apply to a statute passed by the legislature of a *territory: Scott vs. Jones*, 5 How. 343 (see per Woodbury, J., pages 376–379); *Miners' Bank vs. State of Iowa*, 12 How. 1 (see per Daniel, J., pages 6–7). The District of Columbia is not a state against which the statute of limitations will not run, but only a municipal corporation: *Metropolitan R. R. vs. District of Columbia*, 132 U. S. 1 (see per Bradley, J., page 9). In *Downes vs. Bidwell*, 182 U. S. 244, Mr. Justice Brown, after an elaborate review of the authorities (see pages 248–280), concluded that Porto Rico, immediately after its annexation, could be regarded neither as a state nor as a part of the United States within the constitutional provisions that "all duties, imposts and excises shall be uniform throughout the United States." Justices White, Shiras, McKenna and Gray, who with Mr. Justice Brown constituted the majority of the court in that case, do not agree that a regularly organized territory is not within the provision in question, but they do not maintain that such a territory can be called a "state."

On the other hand, the Territory of Washington was held to be a state within the meaning of an act of Congress relating to vessels bound from a port in one state to a port in *any other than an adjoining state:* In re Bryant, Deady 118. The Court proceeded on the grounds that

a territory is a state as the term is used by writers on general law, and that the term is used in the act as a geographical expression rather than a political one (see per Deady, J., 120–121). Another act of Congress provided that the master of a vessel coming in or going out of a port situated upon waters which are the boundary *between two states* might employ any pilot licensed by the laws of either of the states. The same judge held that, even if it should be admitted that the Territory of Washington was not a state in the sense in which the word was used in the Constitution, it was a state in the general sense of the term and within the mischief intended to be remedied by the act: The Ullock, 19 Fed. 207 (see per Deady, J., pages 211–213); The Abercorn, 26 Fed. 877 (see per Deady, J., pages 878–879). An act of Congress provides that national banks may be taxed by the *states* under certain conditions. The Supreme Court held that the Territory of Montana could properly levy a tax under this act, since the term "states" in its wider meaning includes the District of Columbia and the territories, and since, if a state of the Union, a distinct, independent sovereignty, may tax a national bank, there is no reason why a territory subject to Congressional supervision should not be permitted to do so: *Talbott vs. Silver Bow County*, 139 U. S. 438 (see per Brewer, J., pages 440–446). A convention with France gave Frenchmen certain rights in "the States of the Union." The Supreme Court held that, while ordinarily this term would not include the territories and the District of Columbia, that district is in a general sense a "state," and since a treaty must be liberally interpreted, specially where it creates reciprocal rights in the parties to it (as this convention did), the District of Columbia must be held to come within the term "States of the Union."

When we turn to the few cases involving the construction of the interstate commerce clause of the Constitution, with which we are immediately concerned, we do not find harmony among them. Judge Deady, in *Ex parte* Hanson, 28 Fed. 127, said that apparently "the several states" referred to in that clause are only those embraced in the Union (see page 131). On the other hand, Mr. Justice Burford, in *Butner vs. Western Union Tel. Co.*, 2 Okla. 234, speaks of a hypothetical statute of a territory as being unconstitutional because in conflict with the power of Congress "to regulate commerce *between the states and territories*" (see pages 247–248). In *United States vs. Ames*, 95 Fed. 453, the court had to construe an act of Congress making it an offense to cause lottery tickets to be carried "from one state to another." The petitioner was arrested for causing lottery tickets to be carried from Texas to the Territory of New Mexico. It was held that he should

be discharged, a territory not being a "state" within the meaning of the act, which could be sustained under the Constitution only as a regulation of commerce between *states* (see per Jenkins, Circ. J., pages 455–457).

While the matter has not been adjudicated by the United States Supreme Court, we believe that the weight of authority inclines toward the holding that commerce between this state and Hawaii, Porto Rico, or the Philippines is not interstate commerce. We do not mean, however, to advise that your salesmen engaged in such commerce will be subject to territorial or municipal license taxes. Indeed, as a practical matter, we think it unlikely that they can be. Taxation is a matter of legislation. The supreme legislature of each of the places in question is Congress, the body which is given by the Constitution the power to regulate commerce among the several states. One of the main purposes of delegating this power to Congress was to secure uniformity throughout the country in a matter believed to be one of no mere local concern. Under this power Congress could doubtless impose a license tax on all salesmen engaged in interstate commerce. But Congress has not seen fit to do so. It has preferred the uniformity of no taxation at all to the uniformity of an even tax imposed by itself. The commerce in which the salesmen of your Company in Hawaii, Porto Rico, or the Philippines would be engaged would be essentially similar to that in which your salesmen elsewhere are engaged. Congress has not seen fit to tax it expressly, even if we assume that it has power to do so without taxing interstate commerce as well. Can we suppose that in delegating legislative power to the territories or the Philippines it intended to give them the power to affect the uniformity of no taxation which would otherwise exist ? We believe that the contrary supposition should rather be entertained, and think, therefore, that any license tax laws passed by Hawaii, Porto Rico, or the Philippines should be construed as applicable only to domestic commerce and not to the salesmen of your Company. Whether any laws exist in the various places named under which an attempt might be made to tax your salesmen we have not inquired, believing that you can be advised better on this point by local counsel. Our conclusion, you will understand, is not to be regarded as a positive statement of existing law. We believe, however, that it finds some support in the following decisions:

Robbins vs. Shelby County Taxing District, 120 U. S. 489. This is perhaps the leading case on the question of license taxation of salesmen engaged in interstate commerce. Mr. Justice Bradley, in delivering the opinion of the court, gives as one of the reasons why the States

cannot levy such taxes (pages 498–499): "Congress alone can do it; for it is obvious that such regulations should be based on *a uniform system applicable to the whole country.*"

Stoutenburgh vs. Hennick, 129 U. S. 141. Hennick was convicted in the police court of the District of Columbia of engaging within the district in the business of offering for sale as agent of a Baltimore firm certain goods without having obtained a license to do so, contrary to an act of the Legislative Assembly of the District. He was discharged from custody on a writ of *habeas corpus* and on writ of error the United States Supreme Court affirmed the judgment of the lower court on the ground that the business in which Hennick was engaged was "within the domain of the great, distinct, substantive power to regulate commerce, the exercise of which cannot be treated as a mere matter of local concern, and committed to those immediately interested in the affairs of a particular locality;" that the act of the Legislative Assembly of the District was to be regarded "as a regulation of a purely municipal character" not embracing the business in which Hennick was engaged; that Congress could not delegate to the Legislative Assembly of the District the power to tax business agents, such as Hennick, and there was nothing in the record to justify the assumption that it endeavored to do so, the powers granted to the district being municipal merely (see per Fuller, C. J., pages 147–149). Since Congress had not attempted to delegate to the District of Columbia the power to tax salesmen, such as Hennick, the case cannot be regarded as a binding authority to the effect that Congress could not delegate such power to a territorial legislature; but even if it could do so, it seems very unlikely that it will be held to have done so unless the words of the enabling act clearly require such a construction. We may add that in that case Miller, J. dissented on the ground that commerce, one of the parties to which was a citizen of any place out of a state of the Union, was not commerce "among the several states" (pages 149–151.)

Farris vs. Henderson, 1 Okla. 384. The legislature of Oklahoma Territory passed a statute providing for a tax on cattle entering and leaving certain counties of the territory. The statute was held void on the ground that the legislature was given no power by the organic act of the territory to pass such a statute and on the ground that it interfered with commerce between the states south and north of the territory (see per Dale, J., pages 389, 392–395).

Hanley vs. Kansas City Southern Railway Company, 187 U. S. 617.0. The Railway charged a higher rate on goods shipped from one

point in the State of Arkansas to another point in the same state, where a large part of the route was outside of the state in the Indian Territory, than the rate allowed by the State Railroad Commission, and brought a bill for an injunction against enforcing the rate fixed by the Commission. The injunction was granted, the court assuming that the power of Congress in the matter was no less than its power over commerce among the states and holding, therefore, that the State of Arkansas could not fix the rate (see per Holmes, J., pages 619, 620–621). It is to be noted, however, that the court in this case distinguished the case of a tax on receipts, at least one proportioned to the amount of transportation in the State, from a regulation of rates; and in the later case of *Ewing vs. Leavenworth*, 226 U. S. 464, it was held that a state may levy a license tax on an express company for carrying packages from one point in a state to another though a part of the carriage is through another state.

United States vs. Whelpley, 125 Fed. 616. This case arose under the Act of Congress punishing the carrying of lottery tickets from one state to another. The defendants were indicted for shipping lottery tickets from Virginia to the District of Columbia. A demurrer to the indictment was sustained on the ground that the word "state" in a criminal statute of this kind should not be construed as including the District of Columbia. The court said, however, that in view of the decision in *Stoutenburgh vs. Hennick*, supra, and the language of Mr. Justice Holmes in *Hanley vs. Kansas City Southern Railway Company*, supra, a subordinate federal court could not properly hold an Act of Congress regulating commerce from a state to the District of Columbia unconstitutional (see per McDowell, D. J., pages 616–619).

Beitzell vs. District of Columbia, 21 App. Cas. D. C., 49. An Act of Congress imposed a license tax on agents doing business in the District of Columbia. The defendant was the local agent of brewers, whose brewery and offices were located in New York, and had no place of business and kept no goods in stock in the District of Columbia. He solicited orders which were filled at the brewery by shipping the goods directly to the purchaser. The Court held, not deciding whether the District of Columbia is or is not a state within the meaning of the Constitution, that Congress should not be presumed to have intended to disregard the "settled principle of commercial intercourse of the country" exempting from license taxation persons representing owners of property in another state and that, therefore, the defendant was not liable to the tax (see per Alvey, C. J., pages 59–61).

Yours very truly,

JGB—E

GORDON & SMITH.

CHAPTER XLII.

WHY WE EMPLOY ADVERTISING SALESMEN.

When we began making "WEAR-EVER" Aluminum Cooking Utensils in 1901, our salesmen called upon many of the best dealers. Almost every one said that he had stocked up with other aluminum utensils, had been compelled to sacrifice on them, and naturally did not care to lose any more money. Our arguments might be all right, but what he wanted was a good strong demand from satisfied customers before he would consider stocking up again with aluminum utensils.

We thought of that "good strong demand" for a good long time.

We considered advertising; but what was the use of talking in type to dealers who could not be won by personal presentation of our proposition ? And what was the use of advertising to the consumer—only to get her to go to stores inquiring for articles which the dealer not only would not carry but which he at that time would advise her not to purchase ?

Hence, while our faith in aluminum ware waited for improved methods of manufacture and increased volume of business to provide a margin of profit which in the day of the return of dealers' favor might be used in conducting an effective advertising campaign, we employed college students and other suitable persons as advertising salesmen whom we might personally train to teach housewives to use "WEAR-EVER" aluminum utensils intelligently.

OVER 3,000,000 PERSONAL CALLS.

Assume that during a summer 3,000 of these advertising men are in the field, each one making on an average seven calls per day, and throughout the year we have on an average 1,000 salesmen. Figuring conservatively, these trade producers make at least 3,000,000 personal calls during the year, not only on new customers, but also at the homes

of old customers, explaining the merits and uses of "WEAR-EVER" Aluminum Utensils. In the summer of 1912, there were 3,063 men at work and in 1914 there will be about 3,500 in the field.

ONE STORE'S EXPERIENCE.

The Joseph Horne Co. of Pittsburgh attempted to sell our line of utensils during 1902–3, and succeeded by some advertising in selling from $15.00 to $20.00 worth of goods per week. To increase business in Pittsburgh we placed a number of advertising salesmen there, who within two years sold more than $13,000.00 worth of goods. A large stock of utensils was then placed in the Joseph Horne store and a demonstration was conducted. To the surprise of the managers of the store and of ourselves, the sale of "WEAR-EVER" utensils averaged $99.50 per day for the first two months; at the end of which time the Joseph Horne Company conducted the demonstration at their own expense for two years more, and their sales of "WEAR-EVER" ware are still increasing each year.

THE PROOF OF THE PUDDING.

If time and space permitted, similar experiences of other stores, even in small towns, might be cited. Stores in Western Pennsylvania and Ohio, in which territory are located towns which our advertising men have worked practically every year since 1902, are selling more goods than are being sold in districts where canvassers have not worked so long. We can name towns of only 2,000 inhabitants in which our advertising salesmen during the last eight years have sold from $1,500 to $2,000 worth of goods, and the dealers in these towns are now selling more "WEAR-EVER" Aluminum Utensils than are dealers located in larger towns in which our advertising salesmen have worked only two or three years.

SATISFACTION IN THE HOME MEANS SALES AT THE STORE.

We manufacture a number of specialties, several of which are patented articles, and which, without special demonstration and effort, will not sell readily in stores. The use and care of these utensils, bearing the "WEAR-EVER" trade mark, are carefully explained to customers by these salesmen, and the customers if satisfied naturally go to the stores whenever they are ready to replace utensils that wear out with those that "WEAR-EVER."

THE REASON WHY.

A merchant is satisfied with a percentage of profit less than that which an advertising salesman must have in order to justify him in engaging in the work. For this reason dealers who carry the regular line of "WEAR-EVER" utensils always can sell at lower prices than the advertising salesman and yet make a profit as good or better than their average margin on other lines. In order, therefore, to keep these "trade producers" in the field we must assure them that they will be protected in the sale of a few specialties. The fact of greatest significance to dealers and to manufacturers is this: Advertising salesmen have created and can continue to create a "good strong demand" for "WEAR-EVER" Aluminum Utensils. That demand means more business for dealers and for us.

Stevenson & Foster Company
Printers
Pittsburgh, Penna.

WEAR-EVER

TRADE MARK